



## **FEDERAL TRADE COMMISSION**

### **16 CFR Part 310**

### **RIN 3084–AB19**

### **Telemarketing Sales Rule**

**AGENCY:** Federal Trade Commission.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** As part of the Federal Trade Commission’s (“FTC” or “Commission”) regulatory review of the Telemarketing Sales Rule (“TSR” or “Rule”), the Commission issues this advance notice of proposed rulemaking (“ANPR”) to seek public comment on whether the Rule should continue to exempt telemarketing calls to businesses, whether the Rule should require a notice and cancellation mechanism with negative option sales, and whether to extend the Rule to apply to telemarketing calls that consumers initiate to a telemarketer ( i.e. “inbound telemarketing calls”) regarding computer technical support services.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** Interested parties may file a comment online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY**

**INFORMATION** section below. Write “Telemarketing Sales Rule ANPR, R411001” on your comment, and file your comment through <https://www.regulations.gov>. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Benjamin R. Davidson, (202) 326-3055, [bdavidson@ftc.gov](mailto:bdavidson@ftc.gov), or Patricia Hsue, (202) 326-3132, [phsue@ftc.gov](mailto:phsue@ftc.gov), Division of

Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Mail Stop CC-8528, Washington, DC 20580.

## **SUPPLEMENTARY INFORMATION:**

### **I. Introduction**

The Commission reviews its rules and guides periodically to seek information about their costs and benefits and their regulatory and economic impact. The information obtained assists the Commission in identifying rules and guides it should modify or rescind. Where appropriate, the Commission combines such periodic general reviews with reviews seeking information on specific questions about an industry.

On August 11, 2014, the Commission initiated a regulatory review by publishing a notice in the *Federal Register* requesting public comment on the TSR (“Regulatory Review”).<sup>1</sup> It sought comment on questions including whether the Rule continues to be necessary and serve a useful purpose, whether and how the Rule’s compliance burdens and costs can be decreased and its benefits increased, and the impact of changes in the marketplace and new technologies on the Rule. It also requested comment on three specific issues; namely, whether the Rule should: (1) prohibit the sharing of preacquired account information for any purpose; (2) enhance protections for negative option and free offers, and apply them to inbound calls induced by general media advertising; and (3) require sellers and telemarketers to maintain records of the numbers they dial in their telemarketing campaigns.

Having reviewed the record, the Commission is issuing a Notice of Proposed Rulemaking (“NPRM”) seeking comments on the Commission’s proposal to amend the TSR’s recordkeeping provisions and to prohibit deception in business-to-business telemarketing calls.<sup>2</sup> The Commission is also issuing this ANPR seeking comment on

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<sup>1</sup> 79 FR 46732.

<sup>2</sup> The Commission addresses the comments on recordkeeping submitted in response to the Regulatory Review in its proposed NPRM being published in conjunction with this ANPR.

whether to repeal all exemptions regarding telemarketing calls to businesses and inbound telemarketing of computer technical support services, and whether the TSR should provide consumers additional protections for negative option products or services.

## **II. Background**

### **A. Statutory Basis for the TSR**

Enacted in 1994, the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act” or “Act”) targeted deceptive and abusive practices in telemarketing. It directed the Commission to adopt a rule with anti-fraud and privacy protections for consumers receiving telephone solicitations to purchase goods or services, and authorized the Commission and state attorneys general or other appropriate state officials, as well as private persons who meet certain jurisdictional requirements, to bring civil actions against violators in Federal district court.<sup>3</sup>

In determining whether certain practices that do not fall distinctly within the parameters of the Telemarketing Act’s emphasis on protecting consumer privacy are “abusive,” the Commission has applied the unfairness analysis set forth in Section 5(n) of the FTC Act.<sup>4</sup> An act or practice is unfair under Section 5 of the Federal Trade Commission Act (“FTC Act”) if it causes or is likely to cause substantial injury to consumers, if any countervailing benefits to consumers or competition do not outweigh the consumer harm, and if that harm is not reasonably avoidable by consumers.<sup>5</sup>

### **B. TSR History and Key Provisions**

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<sup>3</sup> 15 U.S.C. 6101-6108. Subsequently, the USA PATRIOT Act, Pub. L. No. 107–56, 115 Stat. 272 (Oct. 26, 2001), expanded the Telemarketing Act’s definition of “telemarketing” to encompass calls soliciting charitable contributions, donations, or gifts of money or any other things of value.

<sup>4</sup> Statement of Basis and Purpose and Final Rule Amendments (“2010 TSR Amendments”), 75 FR 48458, 48469 (Aug. 10, 2010) (discussing the Commission’s use of the unfairness standard in determining whether a practice is “abusive”); *see also* 15 U.S.C. 45(n) (codifying the Commission’s unfairness analysis, set forth in a letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, reprinted in *In re Int’l Harvester Co.*, 104 F.T.C. 949, \*95–101 (1984)) (“Unfairness Policy Statement”).

<sup>5</sup> 15 U.S.C. 45(n).

Pursuant to the Telemarketing Act's directive, the FTC promulgated the TSR on August 23, 1995.<sup>6</sup> The Commission subsequently amended the Rule on four occasions: (1) in 2003 to add the National Do-Not Call Registry and other requirements;<sup>7</sup> (2) in 2008 to prohibit unwanted sales robocalls;<sup>8</sup> (3) in 2010 to ban the telemarketing of debt relief services requiring an advance fee;<sup>9</sup> and (4) in 2015 to ban the use in telemarketing of certain payment mechanisms widely used in fraudulent transactions.<sup>10</sup>

The TSR applies to virtually all “telemarketing,” defined in accordance with the Telemarketing Act to mean “a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call.”<sup>11</sup>

The Rule wholly or partially exempts several types of calls from its coverage. For example, it generally exempts telemarketing calls to businesses.<sup>12</sup> It also generally exempts inbound calls placed by consumers in response to direct mail or general media advertising.<sup>13</sup> However, there are certain “carve-outs” from some of the TSR’s exemptions that bring certain conduct back within the ambit of the rule, such as the

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<sup>6</sup> Statement of Basis and Purpose and Final Rule (“Original TSR”), 60 FR 43842 (Aug. 23, 1995). The effective date of the original Rule was December 31, 1995.

<sup>7</sup> See Statement of Basis and Purpose and Final Amended Rule (“2003 TSR Amendments”), 68 FR 4580 (Jan. 29, 2003) (adding Do Not Call Registry and other provisions).

<sup>8</sup> See Statement of Basis and Purpose and Final Rule Amendments (“2008 TSR Amendments”), 73 FR 51164 (Aug. 29, 2008) (addressing the use of robocalls).

<sup>9</sup> See 2010 TSR Amendments (adding debt relief provisions). The Commission subsequently published correcting amendments to the text of section 310.4 the TSR. Telemarketing Sales Rule; Correcting Amendments, 76 FR 58716 (Sept. 22, 2011).

<sup>10</sup> See Statement of Basis and Purpose and Final Rule Amendments (“2015 TSR Amendments”), 80 FR 77520 (Dec. 14, 2015) (prohibiting the use of remotely created checks and payment orders, cash-to-cash money transfers, and cash reload mechanisms).

<sup>11</sup> 16 CFR 310.2(gg) (using the same definition as the Telemarketing Act, 15 U.S.C. 6106(4)). The TSR, like the Telemarketing Act, also excludes catalog sales solicitations. *Id.* The Act also explicitly states that the jurisdiction of the Commission in enforcing the Rule is coextensive with its jurisdiction under Section 5 of the FTC Act. 15 U.S.C. 6105(b).

<sup>12</sup> 16 CFR 310.6(b)(7); See also 2015 TSR Amendments, 80 FR at 77555 (clarifying that the “business-to-business” exemption under 310.6(b)(7) applies only to telemarketing calls that are “soliciting the purchase of goods or services or a charitable contribution [from a] business itself, rather than personal purchases or contributions by employees of the business”).

<sup>13</sup> 16 CFR 310.6(b)(5)-(6). Moreover, the Rule exempts from the National Do Not Call Registry provisions calls placed by for-profit telemarketers to solicit charitable contributions; such calls are not exempt, however, from the “entity-specific” do not call provisions or the TSR’s other requirements. 16 CFR 310.6(a).

carve-out for calls initiated by a consumer in response to a general media advertisement relating to investment opportunities.<sup>14</sup>

The TSR is designed to protect consumers in a number of different ways. First, the TSR includes provisions governing communications between telemarketers and consumers, requiring certain disclosures and prohibiting material misrepresentations.<sup>15</sup> Second, the TSR requires telemarketers to obtain consumers' "express informed consent" to be charged on a particular account before billing or collecting payment and, through a specified process, to obtain consumers' "express verifiable authorization" to be billed through any payment system other than a credit or debit card.<sup>16</sup> Third, the TSR prohibits as an abusive practice requesting or receiving any fee or consideration in advance of obtaining any credit repair services;<sup>17</sup> recovery services;<sup>18</sup> offers of a loan or other extension of credit, the granting of which is represented as "guaranteed" or having a high likelihood of success;<sup>19</sup> and debt relief services.<sup>20</sup> Fourth, the TSR prohibits credit card

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<sup>14</sup> See, e.g., 16 CFR 310.6(b)(5)-(6) (provisions related to general advertisements and direct mail solicitations); 16 CFR 310.2(s) (definition of "investment opportunity"). The TSR's definition of "investment opportunity" includes anything sold in part based on a representation of future income. In addition to traditional passive investments, the definition can also encompass work-from-home opportunities, real estate seminars, multi-level-marketing programs, and programs that purport to educate consumers about the stock market.

<sup>15</sup> The TSR requires that telemarketers soliciting sales of goods or services promptly disclose several key pieces of information in an outbound telephone call or an internal or external upsell: (1) the identity of the seller; (2) the fact that the purpose of the call is to sell goods or services; (3) the nature of the goods or services being offered; and (4) in the case of prize promotions, that no purchase or payment is necessary to win. 16 CFR 310.4(d); see also 16 CFR 310.2(ee) (defining "upselling"). Telemarketers also must disclose in any telephone sales call the cost of the goods or services and certain other material information. 16 CFR 310.3(a)(1). In addition, the TSR prohibits misrepresentations about, among other things, the cost and quantity of the offered goods or services. 16 CFR 310.3(a)(2). It also prohibits making false or misleading statements to induce any person to pay for goods or services or to induce charitable contributions. 16 CFR 310.3(a)(4).

<sup>16</sup> 16 CFR 310.4(a)(7); 16 CFR 310.3(a)(3).

<sup>17</sup> 16 CFR 310.4(a)(2).

<sup>18</sup> 16 CFR 310.4(a)(3). As the Commission has previously explained, "[in] recovery room scams . . . a deceptive telemarketer calls a consumer who has lost money, or who has failed to win a promised prize, in a previous fraud. The recovery room telemarketer falsely promises to recover the lost money, or obtain the promised prize, in exchange for a fee paid in advance. After the fee is paid, the promised services are never provided. In fact, the consumer may never hear from the telemarketer again." Original TSR, 60 FR at 43854.

<sup>19</sup> 16 CFR 310.4(a)(4); see 2003 TSR Amendments, 68 FR at 4614 (finding that these three services were "fundamentally bogus").

<sup>20</sup> 16 CFR 310.4(a)(5).

laundering<sup>21</sup> and assisting and facilitating sellers or telemarketers engaged in violations of the TSR.<sup>22</sup> Fifth, the TSR, with narrow exceptions, prohibits telemarketers from calling consumers whose numbers are on the National Do Not Call Registry or who have specifically requested not to receive calls from a particular entity.<sup>23</sup> Finally, the TSR requires that telemarketers transmit to consumers' telephones accurate Caller ID information<sup>24</sup> and places restrictions on calls made by predictive dialers<sup>25</sup> and those delivering prerecorded messages.<sup>26</sup>

### **C. Legal Standard for Retaining, Amending, or Repealing the TSR**

There is a presumption that an existing rule should be retained.<sup>27</sup> A decision to retain any portion of a current rule may be based upon evidence gathered during the original rulemaking and the Commission's subsequent enforcement experience, as well as evidence adduced during a new rulemaking.<sup>28</sup> Moreover, the Telemarketing Act's rulemaking authorization applies not only to an initial rulemaking, but also to the amendment or repeal of a telemarketing rule.<sup>29</sup>

Because of the "potentially pervasive and deep effect" of FTC rules,<sup>30</sup> the Commission carefully scrutinizes the regulatory review record to determine whether the record is reliable and provides sufficient support for undertaking an industry-wide rulemaking or amendment proceeding. In particular, the Commission routinely evaluates a number of factors, including the relative costs and benefits of the Rule, industry compliance, the effect on competition and consumer choice, its enforcement experience, and the adequacy of case-by-case law enforcement under the FTC Act to address existing

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<sup>21</sup> 16 CFR 310.3(c).

<sup>22</sup> 16 CFR 310.3(b).

<sup>23</sup> 16 CFR 310.4(b)(1)(iii).

<sup>24</sup> 16 CFR 310.4(a)(8).

<sup>25</sup> 16 CFR 310.4(b)(1)(iv); 16 CFR 310.4(b)(4) (call abandonment safe harbor).

<sup>26</sup> 16 CFR 310.4(b)(1)(v).

<sup>27</sup> *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983).

<sup>28</sup> Amended Funeral Rule Statement of Basis and Purpose, 59 FR 1592, 1596 (Jan. 11, 1994).

<sup>29</sup> Federal Trade Commission Organization, Procedures and Rules of Practice, 16 CFR 1.25. *See* 15 U.S.C. 553(e); *see also* 2003 TSR Amendments, 68 FR at 4583.

<sup>30</sup> *American Optometric Ass'n v. FTC*, 626 F.2d 896, 905 (D.C. Cir. 1980).

problems that fall outside the Rule's scope.<sup>31</sup> In addition, as a responsible steward of the public funds allocated to it by Congress, the Commission considers whether a rulemaking or amendment proceeding would serve the public interest, recognizing the rulemaking process requires a substantial, long-term investment of the Commission's finite resources that could otherwise be devoted to enforcement actions against rule violators.

#### **D. Summary of the Regulatory Review Record**

The regulatory review record contains 114 unique responsive comments.<sup>32</sup> They include: two comments from other law enforcement agencies;<sup>33</sup> one comment from a telemarketer;<sup>34</sup> one from an industry services provider;<sup>35</sup> one from a credit card association;<sup>36</sup> and ten comments from industry trade associations representing companies that provide telemarketing services, employ telemarketers, or make their own telemarketing calls to consumers.<sup>37</sup> There are three comments on behalf of 13 consumer advocacy groups,<sup>38</sup> one from an academic,<sup>39</sup> two submissions attaching essentially

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<sup>31</sup> See, e.g., 2003 TSR Amendments and 2008 TSR Amendments.

<sup>32</sup> We cite public comments here by the name of the commenting organization or individual and the comment number. Although the comment record lists 118 submissions, one is a duplicate, American Resort Development Association, Nos. 00100, 00101; one is listed twice, Abrams, No. 00038; one contains a final attachment to a prior submission, Citizens Utility Board, No. 00037 (supplementing No. 00036); and one is simply a comment period extension request, PACE, No. 00039, that was granted by the Commission. 79 FR 61267 (Oct. 10, 2014).

<sup>33</sup> National Assn. of Attorneys General ("NAAG"), No. 00117 (on behalf of the attorneys general from 37 states and one territory); U.S. Department of Justice ("DOJ"), No. 00111.

<sup>34</sup> InfoCision Management Corp., No. 00108.

<sup>35</sup> NobelBiz, Inc., No. 00104.

<sup>36</sup> Visa, Inc., No. 00109.

<sup>37</sup> American Bankers Insurance Association ("ABIA"), No. 00106; American Resort Development Association ("ARDA"), No. 00100; Brand Activation Association ("BAA"), No. 00115; Consumer Credit Industry Association ("CCIA"), No. 00098; Direct Marketing Association ("DMA"), No. 00103; Electronic Retailing Association ("ERA"), No. 00095; MPA-The Association of Magazine Media ("MPA"), No. 00116; National Automobile Dealers Association ("NADA"), No. 00112; Newspaper Association of America ("NAA"), No. 00099; and the Professional Association for Customer Engagement ("PACE"), No. 00107.

<sup>38</sup> AARP, No. 00097; Center for Responsible Lending ("CRL"), No. 00093; and National Consumer Law Center on behalf of itself and the Consumer Federation of America, Americans for Financial Reform, Consumers Union, Consumer Action, Consumer Federation of California, The Maryland Consumer Rights Coalition, National Association of Consumer Advocates, U.S. PIRG, Virginia Citizens Consumer Council, and Consumer Assistance Council, Inc. of Cape Cod and the Islands (collectively, "NCLC"), No. 00110.

<sup>39</sup> The Pennsylvania State University, No. 00114.

identical comments from 2,064 Illinois residents,<sup>40</sup> and 92 unique comments from individual consumers.<sup>41</sup>

### **III. Regulatory Review: Continuing Need for the TSR**

All commenters generally agree on the continuing need for the TSR but differ in their opinions as to whether amendments are necessary. Consumers and their advocates largely argue for amendments they believe will enhance consumer protection including by closing “loopholes” in the TSR, and for more enforcement. Industry representatives, on the other hand, largely advocate against any amendments, arguing the current regulatory requirements, coupled with the existence of self-policing industry organizations, provide consumers sufficient protections.

#### **A. Consumer Perspective**

Consumers and their advocates all support the continuing need for the TSR. The 2,064 largely identical comments from Illinois consumers ask the Commission to “keep and strengthen” the TSR’s consumer protections that have “battled telemarketing fraud and deception for nearly two decades,”<sup>42</sup> and four other individual consumers expressly agree the TSR is still needed and should be retained.<sup>43</sup> AARP asserts it “strongly agrees that there is a continuing need for the [TSR],<sup>44</sup> and the National Consumer Law Center (“NCLC”) and other consumer groups state the TSR “provides important protections for consumers and clear rules of the road for the telemarketing industry.”<sup>45</sup>

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<sup>40</sup> Citizens Utility Board, Nos. 000356 and 00037.

<sup>41</sup> Aside from the Citizens Utility Board comments, the record contains 93 consumer comments, but there are duplicate entries for Abrams, No. 00038. Several consumer comments sought relief from collection agency calls that the TSR does not cover. *See, e.g.*, Gray, No. 00007; Castallo, No. 00128; Wysong, No.00015; Branner, No. 00121; Lehman, No. 00120; and Valdes, No.00014. Several advocate extending the TSR’s do-not-call provisions to cover political, charity, or survey calls. *See, e.g.*, Wright, No. 00002; Anonymous, No. 00089; Rosenow, No. 00067; Goodman, No. 00032; and Lehnen, No. 00030.

<sup>42</sup> Citizens Utility Board, Nos. 00036 and 00037; *see* Rusch, 00046.

<sup>43</sup> Ashley L., No. 00052 (TSR is “still greatly needed, in its entirety”); Leef, No. 00085 (“Please improve – or at least maintain the status quo”); Wright, No. 00002 (“The Do Not Call registry is a valuable resource for consumers and should be continued”); West Italian, No. 00113 at 1 (“We need the TSR, and its enforcement, more than ever”).

<sup>44</sup> AARP, No. 00097, at 2.

<sup>45</sup> NCLC, No. 00110, at 1.



Comments from two other consumer advocates,<sup>46</sup> an academic engaged in relevant behavioral research,<sup>47</sup> and two state and Federal law enforcement agencies<sup>48</sup> state while the TSR is still needed, it is also in need of improvements. In particular, consumers and their advocates argue for additional protections. These include heightened restrictions on the “data pass” of preacquired account information from an initial seller to a third party seller<sup>49</sup> comparable to those of the Restore Online Shoppers’ Confidence Act (“ROSCA”) for online transactions,<sup>50</sup> extending the TSR’s requirements to inbound calls,<sup>51</sup> and requiring sellers and telemarketers to create and maintain their own records of the numbers dialed in telemarketing campaigns to facilitate enforcement by Federal and state agencies and private lawsuits by injured consumers.<sup>52</sup>

More than half of the unique individual consumer comments make a case that more enforcement is needed. They include requests for enforcement against particular violators,<sup>53</sup> reports about specific violations of the TSR,<sup>54</sup> complaints about continuing unwanted calls,<sup>55</sup> demands for more general enforcement of the TSR’s Do Not Call provisions,<sup>56</sup> appeals for more severe penalties to deter violations or a ban on all telemarketing,<sup>57</sup> and concern that violators are calling with impunity due to inadequate

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<sup>46</sup> CRL, No. 00093, at 1; American Association for Justice, No. 00102, at 1.

<sup>47</sup> Grossklags, No. 00114.

<sup>48</sup> NAAG, No. 00117, at 1-2; DOJ, No. 00111, at 1.

<sup>49</sup> Citizens Utility Board, Nos. 00036 and 00037.

<sup>50</sup> 15 U.S.C. 8401. ROSCA requires a third-party merchant that offers add-on products or services after a sale by the initial seller to obtain billing information directly from the consumer, rather than from the initial seller, so the purchaser will understand that there is or will be a charge for any add-on purchase. *See also* AARP, No. 00097, at 3.

<sup>51</sup> Citizens Utility Board, Nos. 00036 and 00037.

<sup>52</sup> West Italian, No. 00113 at 1; AARP, No. 00097, at 5.

<sup>53</sup> Moody, No. 00094; Smith, No. 00091; Austin, No. 00050; Pecoraro, No. 00126; Hall, No. 00012; Peterson, No. 00004; Macias, No. 00123; and Ramseur, No. 00118.

<sup>54</sup> Buchko, No. 00122; Harr, No. 00020; Branner, No. 00121; Alabi, No. 00006; Mercurio, No. 00127; Texas Child, No. 00018; Hines, 00124; Greenwood, No. 00125 Taylor, No. 00022; and Hays, No. 00049.

<sup>55</sup> Swirsky, No. 00025; Duffield, No. 00021; and Harr, No. 00020.

<sup>56</sup> Johannsen, No. 00078; Hardy, No. 00071; Boles, No. 00056; Olson, No. 00027; Taylor, No. 00022; Burton, No. 00005; Kavanaugh, No. 00041; Love, No. 00068; Bradshaw, No. 00065; Gallagher, No. 00051; Waterbury, No. 00044; Dougherty, No. 00043; Schugardt, No. 00031; McGlinchey, No. 00042; Lennon, No. 00028; Cockerill, No. 00082; West Italian, No. 00113 at 2; Rynearson-Moody, 00029; and Whi, No. 00017.

<sup>57</sup> Thompson, No. 00010; Abrams, No. 00038; and Bethea, No. 00016; and Keung, No. 00023.

enforcement.<sup>58</sup> The 2,064 Illinois consumer comments request amendments that: 1) require telemarketers to provide recordings of their calls, 2) ban third-party use of pre-acquired account information, and 3) request stronger consumer protection against inbound telemarketing calls placed in response to advertisements.<sup>59</sup> AARP also notes the number of telemarketing complaints filed with the FTC and Federal Communications Commission (“FCC”) has risen significantly, and “a rise in complaints means more need for enforcement.”<sup>60</sup>

## **B. Industry Perspective**

Industry comments support the continuing need for the TSR and generally oppose any amendments. As one trade organization observes, “the FTC’s enforcement actions under the Rule have provided industry with adequate and predictable notice as to what practices the agency views as acceptable and unacceptable.”<sup>61</sup> Another notes “[i]n its current form, the TSR has functioned well and continues to serve its purpose of protecting the customers we serve as well as the operations of legitimate businesses.”<sup>62</sup> The Professional Association for Customer Engagement (“PACE”) states “[t]he Rule has had an overall positive impact on consumers . . . and there is a continuing need for the majority of its protections.”<sup>63</sup>

PACE, however, also asserts that while it “supports strong enforcement against companies that intentionally violate the Rule’s DNC provisions,” “no additional

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<sup>58</sup> Miller, No. 00057; Marcus, No. 00026; Rothenbach, No. 00024; Gindin, No. 00009; Luttrell, 00077; and Karsback, No. 00074;

<sup>59</sup> Citizens Utility Board, Nos. 00036 and 00037.

<sup>60</sup> AARP, No. 00097, at 5. *See also* NCLC at 11-12 (applauding FTC enforcement action targeting robocall facilitators).

<sup>61</sup> BAA, No. 00115, at 2.

<sup>62</sup> MPA, No. 00116, at 1.

<sup>63</sup> PACE, No. 00107, at 2; *see also* CASRO, No. 00105 (“strongly believes there is a continuing need” for the TSR and lauding it for preventing harm to consumers and the legitimate research industry).

substantive changes are necessary at this time.”<sup>64</sup> The Electronic Retailing Association (“ERA”) agrees “no revisions to the TSR are warranted.”<sup>65</sup>

Most of the industry comments maintain “the current framework of laws, regulations, and industry self-regulation adequately covers telemarketing.”<sup>66</sup> The Direct Marketing Association (“DMA”) stresses “[a]ny changes to the Rule would have adverse impacts on the industry and consumers alike,”<sup>67</sup> and the Consumer Credit Industry Association (“CCIA”) states “[d]ue to the multiple layers of [Federal and state] regulation and legislation, the industry is in a precarious position in attempting to comply.”<sup>68</sup> PACE similarly asks that the Commission “consider the impact other laws and regulations have had on businesses before adopting any additional regulations of its own or expanding the reach of current regulations.”<sup>69</sup>

Several industry trade associations emphasize the voluntary compliance steps they have taken by establishing Self-Regulatory Organizations (“SROs”) to enhance consumer protection. DMA’s Guidelines for Ethical Business Practice (“DMA Guidelines”)<sup>70</sup> and the PACE SRO<sup>71</sup> were created to ensure compliance not only with the TSR, but also all state telemarketing laws and regulations. DMA asserts its Guidelines include a “robust accountability program” that is “enforced by DMA’s Ethics Committee that “processes tens of thousands of complaints annually, and takes action against members and non-members alike,” including disclosure of “cases where companies failed to conform their practices to industry requirements.”<sup>72</sup> The PACE-SRO accredits contact centers that

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<sup>64</sup> PACE, No. 00107, at 2.

<sup>65</sup> ERA, 00095, at 2 (the TSR provides “the FTC with the tools it needs to prosecute offensive telemarketing behavior”). *See also* BAA, 00115, at 2 (the TSR provides a “robust and effective regulatory tool with which to investigate and prosecute offensive telemarketing activities”).

<sup>66</sup> DMA, No. 00103, at 2; *see also, e.g.* BAA, No. 00115, at 2; PACE, No. 00107, at 2; ERA, No. 00095, at 2 (likewise supporting the TSR but opposing any changes).

<sup>67</sup> DMA, No. 00103 at 2.

<sup>68</sup> CCIA, No. 00098, at 4.

<sup>69</sup> PACE, No. 00107, at 2.

<sup>70</sup> DMA, No. 00103, at 3-4.

<sup>71</sup> PACE, No. 00107, at 3-4 (discussing PACE-SRO, *available at* <http://www.pacesroconnect.org>) (last visited Jan. 31, 2022).

<sup>72</sup> DMA No. 00103, at 3-4; *cf.* ERA, No. 00095, at 6.

“undergo an initial and recurring onsite compliance assessment, and are subject to quarterly data audits of their outbound calling records, and those that do not comply fail to obtain accreditation or have their accreditation revoked.”<sup>73</sup>

Both DMA and PACE emphasize that their SRO programs require compliance not only with telemarketing regulations, but also with industry “best practices,” and that they can amend SRO requirements to address new technology and other issues more quickly than government can amend regulations.<sup>74</sup> The associations ask the FTC to encourage and support their SRO efforts as a “strong tool that can assist in preventing the need for increased regulations.”<sup>75</sup>

The public comments on the record from industry and consumer stakeholders, as well as the Commission’s own law enforcement experience, persuade the Commission that the TSR continues to serve an important and useful public purpose. The Commission invites comment on the specific issues discussed below.

#### **IV. Regulatory Review: Comments on Specific Issues**

Commenters also provided responses to the specific issues identified in the Regulatory Review. The majority of the comments focused on whether the Rule should: (1) prohibit or regulate the use or retention of preacquired account information; (2) enhance protections for negative option and free offers, and apply them to inbound calls induced by general media advertising; and (3) require sellers and telemarketers to maintain records of the numbers they dial in their telemarketing campaigns.

##### **A. Should the TSR Ban the Data Pass of Preacquired Account Information?**

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<sup>73</sup> PACE, No. 00107, at 3-4.

<sup>74</sup> DMA, No. 00103, at 3; *cf.* PACE, No. 00107, at 3 (SROs “provide greater flexibility for constantly changing business environments and technologies”).

<sup>75</sup> ERA, No. 00095, at 7; *cf.* PACE, No. 00107, at 3 (arguing “effective SROs are a strong tool that can assist in preventing the need for increased regulations”); DMA, No. 00103, at 3 (“Self-Regulation is the Appropriate Approach”).

The TSR prohibits the disclosure or receipt, for consideration, of unencrypted consumer account numbers for use in telemarketing, except to process a payment.<sup>76</sup> It also prohibits telemarketers and sellers from causing a consumer to be charged, directly or indirectly, without the consumer's express informed consent (i.e. "unauthorized billing") for all transactions, including those using preacquired account information.<sup>77</sup> It does not, however, generally bar the transfer or "data pass" of preacquired consumer account information from one seller or telemarketer to a third party seller or telemarketer, unless doing so results in unauthorized billing.<sup>78</sup> In 2010, Congress enacted ROSCA,<sup>79</sup> requiring a post-transaction third-party seller to obtain a consumer's "express informed consent" to be charged,<sup>80</sup> and prohibiting an "initial merchant" from disclosing the billing information of a consumer for use in an internet sale.<sup>81</sup>

The operating rules of three of the major credit card associations are consistent with ROSCA in prohibiting any "disclosure, exchange, or use" by and among their merchants of preacquired account information for their branded credit, debit and prepaid cards, except to process payments.<sup>82</sup> Thus, the card association rules now require each merchant to obtain a consumer's full account number directly from the consumer at the time of her first purchase from the merchant. In light of ROSCA's passage and the subsequent operating rule changes of the credit card industry, the Regulatory Review sought comment on whether the TSR should be amended to generally ban the data pass of preacquired account information.

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<sup>76</sup> 16 CFR 310.4(a)(6).

<sup>77</sup> 16 CFR 310.4(a)(7). The Commission reiterates that Section 310.4(a)(7) is not limited to transactions involving preacquired account information, but applies to all transactions. *See* 2003 TSR Amendments, 68 FR at 4620 (stating the unauthorized billing provision applies to all transactions and not just transactions involving preacquired account information).

<sup>78</sup> 16 CFR 310.4(a)(7); *see also* 2003 TSR Amendments, 68 FR at 4620 (The Commission considered a general data pass ban on the use of preacquired account information but instead focused on the harm resulting from the use of preacquired account information and included a broader prohibition generally banning unauthorized billing under Part 310.4(a)(7).).

<sup>79</sup> 15 U.S.C. 8401.

<sup>80</sup> 15 U.S.C. 8402(a)(2).

<sup>81</sup> 15 U.S.C. 8402(b).

<sup>82</sup> 79 FR at 46734-35 & n. 34; VISA, No. 00109, at 2.

AARP's comment expresses the view "allowing telemarketers to share information with third parties without consent creates a large loophole that will allow data collectors and lead generators to . . . harm consumers by signing them up for products and services they never intended to purchase or hassling them with unwanted telephone calls."<sup>83</sup> The National Association of Attorneys General ("NAAG") concurs, arguing the "very nature of telemarketing makes the use of preacquired account information difficult to identify" and consumers should have the same protection against unauthorized charges arising from the exchange of preacquired account information in telemarketing sales as ROSCA provides in internet sales, because the same consumer confusion that spurred ROSCA's passage exists in the telemarketing context.<sup>84</sup> NCLC also supports a ban, and asserts data pass is not necessary to conduct legitimate business, arguing that such transfers meet the unfairness test the Commission employs to ban abusive telemarketing practices.<sup>85</sup> VISA likewise urges the Commission to consider "[h]armonizing the TSR with ROSCA" to ensure data pass in telemarketing is not just prevented by the credit card associations and cannot "migrate to other forms of payment to the detriment of consumers."<sup>86</sup>

Industry advocates do not recommend adding a data pass ban to the TSR. The Association of Magazine Media ("MPA") asserts that in the wake of ROSCA and the credit card rules, "usage of the data pass process has declined steadily," and suggests that "concerns regarding deceptive or unfair transfers of preacquired account information are no longer necessary."<sup>87</sup> DMA notes its Guidelines "instruct DMA members not to transfer or exchange credit card numbers when a consumer has a reasonable expectation

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<sup>83</sup> AARP, No. 00097, at 3; *see also* Rusch, No. 00046; Beverly Anne, No. 00066; Tripp, No. 00063; and West Italian, No. 00113, at 2.

<sup>84</sup> NAAG, No. 00117, at 4; AARP, No. 00097, at 3, 5.

<sup>85</sup> NCLC, No. 00110, at 4-5 (citing the harm from data pass that consumers cannot avoid and the lack of benefits to consumers or competition).

<sup>86</sup> VISA, No. 00109, at 4.

<sup>87</sup> MPA, No. 00116, at 2.

that the information will be kept confidential.”<sup>88</sup> Another possible explanation is that Federal laws bar financial institutions from disclosing account numbers to non-affiliates for marketing purposes, including telemarketing.<sup>89</sup>

DMA and PACE argue against the need for a data pass prohibition for a different reason; namely, the TSR already requires a business to obtain a consumer’s “express informed consent” before it can charge her account for a purchase, even if it already has her billing information.<sup>90</sup> Moreover, for payments not made by a debit or credit card, the TSR requires “express verifiable authorization” of the charge by a written authorization signed by the consumer, an audio recording of an oral authorization, or written confirmation of the transaction by mail.<sup>91</sup> DMA and MPA also assert the evidence underpinning enactment of ROSCA cannot support a TSR data pass ban, because online sales are fundamentally different from telemarketing sales.<sup>92</sup>

At this time, it is unclear a TSR amendment restricting the data pass of preacquired account information is necessary to prevent unauthorized billing. The TSR currently prohibits data pass that causes unauthorized billing.<sup>93</sup> It also requires sellers and telemarketers to obtain a consumer’s “express informed consent” to be charged for a good, service, or charitable contribution for any form of payment<sup>94</sup> and “express verifiable authorization” for payments other than credit or debit cards.<sup>95</sup> Further, card

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<sup>88</sup> DMA, No. 00103, at 6.

<sup>89</sup> ABIA, No.00106, at 2; *see also* 15 U.S.C. 6802(d); 12 CFR 1016; 15 CFR 313.12.

<sup>90</sup> DMA, No. 00103, at 6; PACE, No. 00107, at 4; *see* 16 CFR 310.4(a)(7). PACE also expresses concern that a data pass ban would prevent sellers from using third-party telemarketers, who must be able to transmit billing information back to the seller.

<sup>91</sup> 16 CFR 310.3(a)(3).

<sup>92</sup> DMA, No. 00103, at 5; MPA, No. 00116, at 2; *but see* NAAG No. 00117, at 5 (“the same consumer confusion which spurred ROSCA’s passage also exists in the telemarketing arena”).

<sup>93</sup> 16 CFR 310.4(a)(7).

<sup>94</sup> *Id.*

<sup>95</sup> 16 CFR 310.3(a)(3).

association rules and other Federal laws, including the 2015 TSR payment method prohibitions,<sup>96</sup> provide additional protections against unauthorized billing.

The Commission, however, does recognize it may be difficult to identify when preacquired account information has resulted in unauthorized billing in the context of telemarketing, in part because it is not always clear whether consumers have provided “express informed consent” or “express verifiable authorization” (collectively, “consent”) for a particular transaction.<sup>97</sup> To address this challenge, among others, the Commission is issuing an NPRM that would require telemarketers and sellers to retain complete records of consumer consent, including documentation on the purpose for which consent is sought, in the same manner and format that the request for consent is presented to consumers.<sup>98</sup> The Commission believes the proposed recordkeeping requirements will help clarify the extent to which the use of preacquired account information may result in unauthorized billing, and whether additional protections against the data pass of preacquired account information are necessary. Thus, the Commission is seeking comment on these issues in the NPRM.

## **B. Should the TSR Require Consumer Consent for the Retention of Account Information?**

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<sup>96</sup> On December 14, 2015, one year after the regulatory review comment period closed, the Commission issued antifraud amendments to the TSR. 2015 TSR Amendments, 80 FR at 77520. The amendments prohibited the use of remotely created checks, remotely created payment orders, cash-to-cash money transfers and cash reload mechanisms in telemarketing. 16 CFR 310.4(a)(9) & (10). Each of the prohibited payment mechanisms had been widely used by fraudulent sellers and telemarketers and three commenters urged the Commission to adopt these amendments during the regulatory review comment period. AARP, No. 00097, at 3; NCLC, No. 00110, at 15; NAAG, No. 00117, at 12-13. During its rulemaking, the Commission concluded that the TSR’s “express verifiable authorization” requirement for payments other than credit or debit cards was not sufficient to prevent consumer harm because unscrupulous telemarketers that use these payment methods typically ignore the TSR’s restrictions. 2015 TSR Amendments, 80 FR at 77543. Given the pervasiveness of fraud resulting from these payment mechanisms and the minimal legitimate uses for them, the Commission decided to ban these payment mechanisms as a bright line rule that benefits competition and consumers. *Id.* at 77537.

<sup>97</sup> See, e.g., NAAG, No. 00117, at 4- 5. See also *FTC v. Vacation Property Services*, No. 8:110cv099585, 2012 WL 1854231, at \*3 (M.D. Fla. May 21, 2012) (rejecting defendant’s arguments that it had obtained consumers’ express consent through a separate verification call); *FTC v. Publishers Business Services, Inc.*, 821 F. Supp. 2d 1205, 1224 (D. Nev. 2010) (same).

<sup>98</sup> See NPRM Section III.B.4.



When a consumer gives a seller or telemarketer her account information to pay for a purchase, that information will be covered by the TSR's definition of "preacquired account information" if the seller retains and uses the information for subsequent purchases in the same or a subsequent telemarketing call.<sup>99</sup> The Regulatory Review asked whether sellers and telemarketers should be required to obtain consumer consent to retain preacquired account information to prevent unauthorized billing.

Consumer advocates acknowledge consumers would not be surprised that a seller to whom they have given their account information has retained it, since sellers may need it for purposes such as canceling the transaction and crediting the consumer's account.<sup>100</sup> PACE and DMA also argue that from an industry perspective, sellers need to keep account information obtained directly from a consumer not only for cancellation purposes, but also to facilitate and expedite returns, exchanges, refunds, and order modifications.<sup>101</sup>

NCLC urges the Commission to amend the TSR to add four safeguards to protect consumers if sellers retain their billing information.<sup>102</sup> Specifically, NCLC requests the following protections in transactions involving preacquired account information: (1) sellers should obtain a consumers' "express verifiable consent" to retain their billing information; (2) sellers should confirm the last four digits of the consumers' account number, and if the account has an expiration date, to confirm the expiration date; (3) sellers should allow consumers the right to revoke their consent to retain their account information at any time; and (4) sellers should allow consumers to use a different account than the one previously provided to complete a transaction.

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<sup>99</sup> 16 CFR 310.2(z).

<sup>100</sup> NCLC, No. 00110, at 6.

<sup>101</sup> PACE, No. 00107, at 4; DMA, No. 00103, at 7. MPA notes that its members generally do not retain account information except in the case of automatic renewal transactions in which case the information is retained as "a service of convenience." No. 00116 at 2.

<sup>102</sup> NCLC, No. 00110, at 7.

Industry advocates argue against amending the TSR to add safeguards for transactions involving preacquired account information. They point out that the “retention [of preacquired account information] is different from charging a consumer’s account,”<sup>103</sup> and consumers have sufficient protection because the TSR already requires sellers to obtain a consumer’s authorization to charge her account even if they have the information on file.<sup>104</sup> DMA also emphasizes that sellers and telemarketers must obtain a consumer’s “express informed consent” before charging an account, and must “identify the account to be charged with ‘sufficient specificity for the customer or donor to understand what account will be charged.’”<sup>105</sup>

While NCLC’s proposals may have merit, neither the Commission’s law enforcement experience nor the regulatory review provide sufficient evidence to warrant further Commission action at this time.

### **C. Should the TSR Provide Additional Protections For Negative Option Offers, Including Free-to-Pay Conversion transactions?**

For telemarketing transactions involving preacquired account information, such as negative option offers, the TSR requires sellers and telemarketers to: (1) identify the account to be charged with sufficient specificity so that a consumer understands what account will be charged; and (2) confirm the consumer’s “express agreement” to charge that account to complete the transaction.<sup>106</sup> For transactions involving both preacquired account information and a “free-to-pay conversion”<sup>107</sup> feature, such as free-trial offers, the TSR provides additional protections by requiring sellers and telemarketers to record the

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<sup>103</sup> DMA, No. 00103, at 6.

<sup>104</sup> PACE, No. 00107, at 4.

<sup>105</sup> DMA, No. 00103, at 3 (quoting 16 CFR 310.4(a)(7)(ii)(A) (requiring, in any transaction involving preacquired account information, that sellers and telemarketers obtain a consumer’s “express agreement” to be charged using an account identified with sufficient specificity for the consumer to understand what account will be charged as evidence of her “express informed consent”)).

<sup>106</sup> 16 CFR 310.4(a)(7)(ii).

<sup>107</sup> 16 CFR 310.2(r) (defining “free-to-pay conversion” as an offer in which the consumer will receive a product or service for free for an initial period and will incur an obligation to pay for it if she does not take affirmative action to cancel before the end of that trial period).

entire telemarketing call, obtain the last four digits of the account number to be used, and confirm the consumer's "express agreement" to charge that account to complete the transaction.<sup>108</sup> For payment mechanisms other than credit or debit cards, the telemarketer or seller must also obtain "express verifiable authorization," which for oral authorizations includes the number of times a consumer will be charged and the dates of those charges.<sup>109</sup> The Regulatory Review sought comment on whether changes in the marketplace require additional protections for negative option offers, including "free-to-pay conversion" transactions.<sup>110</sup>

Consumer advocates argue the existing protections are inadequate and offer a myriad of recommendations for enhanced protections. NAAG argues additional protections are necessary because all negative option offers generate "confusion, misunderstanding, and outright deception" because some consumers do not understand that sellers will interpret their silence and inaction as authorization to charge recurring payments.<sup>111</sup> NAAG suggests an amendment to the TSR requiring a statement of the negative option terms in the initial telemarketing transaction that is separate from the other terms of the offer, and a separate audible acceptance of the negative option terms.<sup>112</sup> NAAG also suggests the TSR should require telemarketers to send a "confirmation to the consumer, whether by mail or otherwise" whenever a consumer is enrolled in a negative option feature.<sup>113</sup> NCLC suggests that for all negative option offers using preacquired account information, the TSR should require sellers and telemarketers to obtain full account numbers directly from the consumer every time they charge the consumer so consumers will understand their account will be charged.<sup>114</sup>

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<sup>108</sup> 16 CFR 310.4(a)(7)(i).

<sup>109</sup> 16 CFR 310.3(a)(3)(ii); *see also* 2015 TSR Amendments.

<sup>110</sup> 79 FR at 46735.

<sup>111</sup> NAAG, No. 00117, at 3, 6.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> NCLC, No. 00110, at 7.

For “free-to-pay conversion” offers in particular, NCLC urges the Commission to adopt an amendment barring sellers from obtaining account information until the end of the trial period, or at least an amendment requiring sellers to give consumers timely phone or email reminders about how to avoid a charge a few days before they will charge the consumer’s account.<sup>115</sup> AARP’s comment concurs and proposes requiring sellers to send a reminder notice and obtain confirmation of a consumer’s continued desire to complete the purchase not only for “free-to-pay conversion” offers, but for all negative option offers.<sup>116</sup>

NAAG also advocates for stronger protections in the context of free-to-pay conversion offers. Specifically, NAAG suggests that the Commission extend Section 310.4(a)(7) to all such offers, even if no preacquired account information is used, to ensure telemarketers obtain a consumer’s express informed consent before telemarketers are able to bill or send invoices to consumers after the “free trial” is over.<sup>117</sup>

Industry advocates object to all of these proposed changes. DMA emphasizes both card association rules and SRO Guidelines require a third-party seller with preacquired account information to obtain the full account number directly from the consumer for “free-to-pay conversion” offers.<sup>118</sup>

Industry also contends the TSR’s current requirements appropriately balance consumer convenience and protection. For example, MPA argues free trials and automatic renewals benefit consumers, particularly in situations where consumers are repeat customers and already have an established business relationship with the seller.

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<sup>115</sup> *Id.* at 9-10. NCLC also advocates requiring that an automated toll-free telephone number be made available to accept cancellations without speaking to a representative 24 hours a day, and forbidding requirements for a written notice of cancellation, along with other conditions that make it unduly burdensome to cancel.

<sup>116</sup> AARP, No. 00097, at 4; *cf.* NAAG, No. 00117, at 11 (urging that the TSR require a telemarketer to send a confirmation to the consumer at the time of enrollment in a negative option that clearly and conspicuously sets forth the terms of the negative option plan).

<sup>117</sup> NAAG, No. 00117, at 11.

<sup>118</sup> DMA, No. 00103, at 4, 6.

MPA and other industry representatives state that requiring consumers to repeat their full 16-digit card number for each additional negative option offer, such as an automatic magazine subscription renewal, would frustrate consumers and would negatively impact legitimate business.<sup>119</sup>

DMA concurs, emphasizing the TSR and its SRO Guidelines require sellers to disclose all material terms of the offer, “identify the account [to be charged] with specificity,” and “obtain affirmative consent from the consumer to charge that account.”<sup>120</sup> DMA further argues requiring sellers to obtain full account information from existing customers simply increases the cost and time involved in the transaction, thus frustrating consumers without providing any additional protections.<sup>121</sup> PACE adds the TSR’s requirement that sellers and telemarketers obtain a consumer’s authorization to charge her account gives the FTC “ample authority to pursue entities charging accounts without proper authorization.”<sup>122</sup>

As discussed above, the Commission is proposing to amend the TSR’s recordkeeping provisions to explicitly require telemarketers and sellers to retain complete and accurate records of consumers’ “express informed consent” to be charged for a particular transaction.<sup>123</sup> In the event a transaction includes a negative option, including “free-to-pay” or “fee-to-pay” conversion offers, a complete record of “express informed consent” must include the purpose for which consent is requested, the account that will be charged, the date a consumer provided consent, and the consumer’s consent to be charged using the identified account for the relevant good or service. The proposed recordkeeping requirements also require sellers and telemarketers to retain records that demonstrate they have comported with Section 310.4(a)(7)’s requirements regarding the

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<sup>119</sup> MPA, No. 00116, at 3; *see also* DMA, No. 00103 at 6-7; ARDA, No. 00100, at 7. PACE, No. 00107, at 4.

<sup>120</sup> DMA, No. 00103, at 6-7.

<sup>121</sup> *Id.* at 3.

<sup>122</sup> PACE, No. 00107, at 4.

<sup>123</sup> *See supra* VI.A.

use of preacquired account information. The Commission believes the new recordkeeping requirements will provide additional protections to consumers by ensuring sellers and telemarketers obtain actual “express informed consent” from consumers to be charged for a transaction with a negative option feature.<sup>124</sup> The Commission also believes these requirements will be more effective than requiring third-party telemarketers to obtain the full account information from consumers as an indication of consent because consumers providing full account information may not understand that they are being sold a transaction with a negative option feature.

The Commission is also interested in exploring the commenters’ suggestions that sellers or telemarketers provide consumers notice and the opportunity to cancel negative option transactions whenever they are billed.<sup>125</sup> Requiring sellers or telemarketers to provide consumers with reminders of negative option programs and simple cancelation mechanisms may be an effective way of reducing consumer harm without overburdening industry. However, the Commission is aware of potential logistical hurdles to providing notification and cancelation with telemarketing transactions. For example, do telemarketers typically obtain consumers’ email addresses, and if so, would email be an effective method to send a notification? Should telemarketers provide cancelation mechanisms by phone or would online mechanisms be more convenient for consumers? As outlined below in Section V, the Commission is seeking comment on whether the

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<sup>124</sup> See NPRM Section III.B.4. NAAG also reports that telemarketers are circumventing the heightened “express informed consent” requirements for “free-to-pay” conversion offers by charging a “nominal upfront fee.” No. 00117, at 5. (“By offering their products and services for an initial term at a nominal upfront price . . . telemarketers relying on preacquired account information circumvent the TSR’s requirement of obtaining the last four (4) digits of the consumer’s account number and the equally important requirement of maintaining an audio recording of the entire transaction.”). The proposed recordkeeping requirements that clarify the records necessary to prove that a consumer has consented to a transaction should eliminate any incentive to circumvent the express informed consent requirement.

<sup>125</sup> AARP suggests that companies “send a reminder to the consumer and receive confirmation the consumer still wants to purchase the service or product.” AARP, No. 00097, at 4. *cf.* NAAG, No. 00117, at 11 (urging that the TSR require a telemarketer to send a confirmation to the consumer at the time of enrollment in a negative option that clearly and conspicuously sets forth the terms of the negative option plan).

TSR should require negative-option sellers to provide simple notice and cancellation mechanisms, and how these mechanisms should be provided.

Beyond the changes the Commission is proposing to the recordkeeping provisions, and the Commission's request for information about notice and cancellation mechanisms, the Commission does not agree with the additional rule proposals made by commenters. Commenters proposed the rule: (1) require sellers and telemarketers to obtain a full account number from consumers every time they are charged; or (2) defer payment authorization until the end of the trial period. The Commission does not believe these proposals would provide protections against deceptive negative option offers that outweigh the likely increased consumer frustration due to longer, complicated transactions and additional burdens on industry. And with respect to NAAG's suggestion that Section 310.4(a)(7) should be extended to all free-to-pay conversion transactions regardless of whether preacquired account information is involved, the Commission does not believe such an amendment is necessary. Section 310.4(a)(7) already requires telemarketers or sellers to obtain a consumer's express informed consent to be charged for the good, service, or charitable contribution in all telemarketing transactions, including those that do not involve the use of preacquired account information. The Commission nonetheless reiterates that Section 310.4(a)(7)'s requirement of obtaining a consumer's express informed consent before billing a consumer applies to all telemarketing transactions, including those in which the consumer is billed for a good or service at a later date after the "free trial" is over.

#### **D. Is There A Need To Apply Outbound Call Protections To Inbound Calls?**

The TSR generally exempts inbound calls responding to media advertising, with some specific exceptions.<sup>126</sup> The Regulatory Review asked if there is a need to amend the

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<sup>126</sup> 16 CFR 310.6(b)(5).

exemption in view of the proliferation of infomercials in the marketplace, including for negative option offers.

Consumers and their advocates regard the general media exemption as a “loophole” in the TSR, advocating that the TSR should apply to all telemarketing calls regardless of which party initiated the call.<sup>127</sup> NAAG cites the Commission’s 2013 Consumer Fraud Survey as support because it reports that more than half of frauds are marketed through means other than telemarketing.<sup>128</sup> Consumer advocates specifically suggest the TSR should apply equally to inbound and outbound telemarketing for negative option offers. NCLC asserts the TSR requirements for the use of preacquired account information in negative option offers should apply to all inbound calls responding to general media and direct mail ads because “the potential risks are the same” as offers in outbound telemarketing.<sup>129</sup> NAAG agrees, and advocates an amendment to extend the TSR’s outbound call material terms disclosure requirements for negative option offers, as well as the ban on misrepresenting any aspect of such offers, to all inbound calls induced by direct mail or general media ads.<sup>130</sup>

Industry advocates uniformly oppose adding any limitations to either the general media or direct mail exemptions. PACE and ERA agree all material terms and conditions of negative option offers should be disclosed prior to any sale, but argue against amending the TSR to require the disclosures be made during an inbound call.<sup>131</sup> DMA explains that required oral disclosures during inbound calls would be duplicative in many cases of disclosures in the marketing materials that induced the call.<sup>132</sup> BAA adds that unlike answering outbound telemarketing calls, consumers placing inbound calls have the

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<sup>127</sup> Kapecki, No. 00084; Rosenow, No. 00067; Beverly Anne, No. 00066; Tripp, No. 00063; and Steel, No. 00070.

<sup>128</sup> NAAG, No. 00117, at 8 (stating that the 2013 survey reported 59.3% of fraud incidents were the result of fraudulent offers through general media advertising).

<sup>129</sup> NCLC, No. 00110, at 7.

<sup>130</sup> NAAG, No. 00117, at 10.

<sup>131</sup> PACE, No. 00107, at 6; ERA, No. 00095, at 3.

<sup>132</sup> DMA, No. 00103, at 7.



“luxury, time and discretion to decide whether to respond” to general media or direct mail ads, and can obtain “the information they need to make an informed purchasing decision” in advance of or during the call.<sup>133</sup>

MPA argues applying the TSR’s disclosure requirements to inbound telemarketing for newspaper subscriptions, particularly for existing customers, would add time and expense for industry to comply without providing additional consumer protections when the general media advertisement includes all material terms of the offer.<sup>134</sup> ERA similarly argues against a disclosure requirement without evidence of widespread abuse.<sup>135</sup> ERA joins PACE in contending the Commission can always rely on its authority under Section 5 of the FTC Act to bring cases against sellers that fail to disclose material terms in their advertising or during an inbound call.<sup>136</sup>

The general media and direct mail exemptions for inbound calls contain additional limitations that narrow the scope of the exemptions. For example, negative option sales in inbound telemarketing that are upsells after an initial purchase are expressly excluded from both the general media and direct mail exemptions.<sup>137</sup> The TSR’s outbound call provisions therefore are equally applicable to inbound call upsells.

Whether and to what extent there may be a problem with inbound telemarketing calls offering a negative option is unclear from the regulatory review record. It therefore is difficult to determine at this time whether there is a need for an amendment that would apply the negative option disclosure requirements and prohibitions or other protections to such calls. The Commission is mindful, however, of the rising trend of certain types of

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<sup>133</sup> BAA, No. 00115, at 3.

<sup>134</sup> MPA, No. 00116, at 4.

<sup>135</sup> ERA, No. 00095, at 3. ERA disputes NAAG’s contention that the FTC’s Third Consumer Fraud Survey provides evidence of pervasive fraud in general media advertising. *Compare* ERA, No. 00095, at 5 *with* NAAG, No. 00117, at 8.

<sup>136</sup> ERA, No. 00095, at 5. ERA and PACE made these comments before the Supreme Court held that Section 13(b) of the FTC Act does not authorize courts to award equitable monetary relief. *See AMG Capital Management, LLC v. FTC*, 141 S.Ct. 1341 (2021).

<sup>137</sup> 16 CFR 310.6(b)(5)(iii) and (b)(6)(iii).

goods or services that are marketed through general media or direct mail and induce inbound telemarketing sales that often include a negative option feature. In particular, the Commission’s law enforcement experience indicates that scams offering computer technical support services (or “tech support”) have been a rising trend that particularly impacts older adults and are marketed through inbound telemarketing.<sup>138</sup> Many of these tech support services also include negative options. As a result, as outlined below in Section V, the Commission is seeking comment on whether the TSR should apply to inbound telemarketing of tech support services.<sup>139</sup> The Commission also seeks comment in Section V.E on the number of sellers or telemarketers who deceptively sell products or services with negative options, other than tech support services, solely through inbound telemarketing.

#### **E. Should the Rule Continue to Exempt Business-to-Business Telemarketing?**

Currently the TSR exempts telemarketing calls to “any business to induce the purchase of goods or services or a charitable contribution by the business,” (i.e. “business-to-business exemption” or “B2B exemption”).<sup>140</sup> The Commission sought comment on how sales to a “home-based business should be treated” under the Rule.<sup>141</sup> One comment suggests “home business[es] should be treated more like [] consumer[s]...out of deference to the overall home environment....The same phone often

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<sup>138</sup> See FTC Data Spotlight, *Older Adults Hardest Hit by Tech Support Scams* (“FTC Data Spotlight”) (Mar. 7, 2019) (tech support scams particularly impact older adults), available at <https://www.ftc.gov/news-events/blogs/data-spotlight/2019/03/older-adults-hardest-hit-tech-support-scams> (last visited Jan. 31, 2022); FTC Report to Congress, *Protecting Older Consumers, 2019-2020* (“2020 Protecting Older Consumers Report”) at 6 (Oct. 18, 2020), available at [https://www.ftc.gov/system/files/documents/reports/protecting-older-consumers-2019-2020-report-federal-trade-commission/p144400\\_protecting\\_older\\_adults\\_report\\_2020.pdf](https://www.ftc.gov/system/files/documents/reports/protecting-older-consumers-2019-2020-report-federal-trade-commission/p144400_protecting_older_adults_report_2020.pdf) (last visited Jan. 31, 2022).

<sup>139</sup> See *infra* Section V.A.

<sup>140</sup> 16 CFR 310.6(b)(7). This exemption, however, does not apply to the telemarketing of nondurable office or cleaning supplies. *Id.*

<sup>141</sup> 79 FR at 46738.

handles both personal and business calls in a home business or in a home occupied by an independent consultant or freelancer.”<sup>142</sup>

PACE, however, argues the current exemption “properly strikes a balance between consumer protection and overregulation and should be left intact.”<sup>143</sup> PACE also asserts allowing the exemption to continue “represents sound public policy and equitableness because it is impossible for callers to know whether the phone provider classifies the number as a residential or business number.”<sup>144</sup>

Although the Commission did not receive many comments on this question, the Commission’s law enforcement experience with deceptive business-to-business telemarketing along with changing market forces influencing where consumers perform their jobs and the nature of those jobs raise the question whether the TSR should continue to exempt such calls. Thus, for the reasons outlined below in Section V, the Commission is seeking additional comment on whether the TSR should continue to exempt business-to-business telemarketing.<sup>145</sup>

## **F. Other Commenter Proposals**

A number of comments have recommended a variety of other amendments to the TSR. These comments fall into the following categories: (1) revision of prior determinations or interpretations the Commission is not inclined to reconsider;<sup>146</sup> (2)

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<sup>142</sup> West Italian, No. 00113, at 3.

<sup>143</sup> PACE, No. 00107, at 6.

<sup>144</sup> *Id.*

<sup>145</sup> See *infra* Section V.B.

<sup>146</sup> Infocision, No. 00108, at 2 (amendment to exempt for-profit telemarketers who offer goods or services on behalf of non-profits (i.e., ticket sales on behalf of a ballet company)); NAA, No. 00099, at 1-6 (amendment of the “established business relationship” exception to allow live calls to introduce digital offerings to former newspaper subscribers with numbers on the Do Not Call Registry); ARDA, No. 00100, at 2-4 (e.g., amendments to the prohibition to send robocalls and relaxing the restrictions on abandoned calls to existing customers); NCLC, No. 00110, at 14 (amendment to change the assisting and facilitating knowledge standard from “knows or consciously avoids knowing” to “knows or has reason to know”); NobelBiz, No. 00104, at 5 (amendment stating that the transmission of an erroneous name or failure to transmit a name pursuant to the TSR’s caller ID provision is not a violation unless there was intent to deceive the call recipient).

amendments the Commission does not believe are necessary;<sup>147</sup> (3) amendments outside of the agency's jurisdiction;<sup>148</sup> and (4) amendments that lack data to support the suggested change.<sup>149</sup> As such, the Commission is not inclined to further consider or implement these requested amendments.

## **V. Request for Comments**

In determining the advisability of exempting certain calls from complying with the TSR the Commission considers the following factors: (1) did Congress intend the TSR to cover such calls; (2) is the conduct or business in question regulated extensively by Federal or state law; (3) in the Commission's law enforcement experience, does the conduct or business lend itself to the type of deceptive acts and practices that the TSR is intended to address; and (4) would it be unduly burdensome to require businesses to comply with the TSR compared to the likelihood that sellers or telemarketers engaged in fraud will use the existing exemption to circumvent the TSR's coverage.<sup>150</sup>

To assist the Commission in evaluating these factors, the Commission seeks comments on whether the TSR should: (1) apply to inbound telemarketing of tech support services; (2) apply to telemarketing to businesses; and (3) require telemarketers to provide consumers with notice that they are about to be billed for a negative option product or service and provide consumers with a simple cancellation mechanism. The Commission also seeks comments on the benefits and estimated burdens these potential rule changes would impose on sellers and telemarketers. In their replies, commenters

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<sup>147</sup> NAA, No. 00099, at 7-8 (amendment to require monthly purging of disconnected and reassigned numbers on the Registry which is unnecessary since the agency already performs such purging – *see* FTC, Do-Not-Call Improvement Act of 2007, Report To Congress: Regarding the Accuracy of the Do Not Call Registry (Oct. 2008), *available at* <https://www.ftc.gov/sites/default/files/documents/reports/do-not-call-improvement-act-2007-report-congress-regarding-accuracy-do-not-call-registry/p034305dncreport.pdf>); Air Rehab. Corp., No. 00047 (amendment to exempt calls to arrange face-to-face sales meetings which are already exempt under Section 310.6(b)(3)); Whi, No. 00017 (amendment to permit private lawsuits, which are already permitted under the Telemarketing Act, 15 U.S.C. 6104, and the Telephone Consumer Protection Act, 47 U.S.C. 227(b)(3)).

<sup>148</sup> *See, e.g.*, ARDA, No. 00100, at 2, 4-6 (amendments relating to issues under the FCC's jurisdiction, including autodialers, cell phones, and SMS texts).

<sup>149</sup> *See, e.g.*, CRL, No. 00093 at 4, 10 (acknowledging lack of data); NCLC, No. 001100, at 18-19.

<sup>150</sup> Original TSR, 60 FR at 43859.

should provide any available evidence and data that supports their position, such as empirical data on the harm to consumers caused by deceptive inbound telemarketing of tech support services, deceptive telemarketing to businesses, or the failure to provide consumers with notice and simple cancellation mechanism in negative option telemarketing. Commenters should also provide any empirical data on the costs to sellers or telemarketers that would be caused by applying the TSR's requirements on inbound telemarketing of tech support services, telemarketing to businesses, or requiring notification and a simple cancellation mechanism for negative option products or services. The questions are designed to assist the public and should not be construed as a limitation on the issues about which a public comment may be submitted.

#### **A. Inbound Telemarketing of Computer Technology Support Services**

Consumer complaints about tech support scams have increased dramatically over the last few years, ranging from approximately 40,000 complaints in 2017 to approximately 100,000 complaints in 2020.<sup>151</sup> In 2018, consumers reported losing more than \$55 million to these scams, with an average individual loss of approximately \$400, and an average individual loss for consumers over the age of 60 of approximately \$500.<sup>152</sup> Indeed, tech support scams disproportionately harm older consumers, with consumers age 60 and over being six times more likely to report a financial loss to tech

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<sup>151</sup> See FTC Consumer Sentinel Network Databook 2020, at 86, (Feb. 2021), *available at* [https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2020/csn\\_annual\\_data\\_book\\_2020.pdf](https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2020/csn_annual_data_book_2020.pdf) (last visited Jan. 31, 2022); FTC Consumer Sentinel Network Databook 2017, at 93, (last visited Jan. 31, 2022), *available at* [https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2017/consumer\\_sentinel\\_data\\_book\\_2017.pdf](https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2017/consumer_sentinel_data_book_2017.pdf) (last visited Jan. 31, 2022).

<sup>152</sup> See, FTC Data Spotlight, *available at* <https://www.ftc.gov/news-events/blogs/data-spotlight/2019/03/older-adults-hardest-hit-tech-support-scams> (last visited Jan. 31, 2022).

support scams compared to younger consumers.<sup>153</sup> From 2015 to 2018, older adults filed more reports on tech support scams than on any other fraud category.<sup>154</sup>

The scam typically begins with an outbound telemarketing call, a pop-up message on a consumer's computer, or an advertisement that induces inbound telemarketing calls.<sup>155</sup> The scammers typically pretend to represent well-known companies such as Microsoft, McAfee, or Symantec, and in their outbound calls, they inform consumers that they have detected an issue on their computers.<sup>156</sup> Alternatively, scammers use deceptive computer pop-up messages that tell consumers to run a scan resulting in numerous "error" messages.<sup>157</sup> Or, they place search engine advertisements displayed when a consumer searches online for either the phone number of her computer company or for information about an issue she is having with her computer.<sup>158</sup> The pop-up messages and search engine advertisements typically direct consumers to call a phone number to fix the purported problems. Once consumers connect with telemarketers, whether through outbound telemarketing or inbound, the telemarketers convince consumers there are a

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<sup>153</sup> See 2020 Protecting Older Consumers Report, at 6, *available at* [https://www.ftc.gov/system/files/documents/reports/protecting-older-consumers-2019-2020-report-federal-trade-commission/p144400\\_protecting\\_older\\_adults\\_report\\_2020.pdf](https://www.ftc.gov/system/files/documents/reports/protecting-older-consumers-2019-2020-report-federal-trade-commission/p144400_protecting_older_adults_report_2020.pdf) (last visited Jan. 31, 2022).

<sup>154</sup> FTC Data Spotlight, *available at* <https://www.ftc.gov/news-events/blogs/data-spotlight/2019/03/older-adults-hardest-hit-tech-support-scams> (last visited Jan. 31, 2022); *see also* FTC Report to Congress, Protecting Older Consumers, 2018-2019, at 5 (Oct. 18, 2019), *available at* <https://www.ftc.gov/reports/protecting-older-consumers-2018-2019-report-federal-trade-commission> (last visited Jan. 31, 2022). In 2019, reports of online shopping frauds became the top fraud complaint for older consumers, with tech support scams dropping to second place. 2020 Protecting Older Consumers Report, at 7, *available at* [https://www.ftc.gov/system/files/documents/reports/protecting-older-consumers-2019-2020-report-federal-trade-commission/p144400\\_protecting\\_older\\_adults\\_report\\_2020.pdf](https://www.ftc.gov/system/files/documents/reports/protecting-older-consumers-2019-2020-report-federal-trade-commission/p144400_protecting_older_adults_report_2020.pdf) (last visited Jan. 31, 2022). Older consumers, however, are less likely to report losing money to online shopping frauds, compared to younger consumers. *Id.*

<sup>155</sup> See, e.g., Prepared Statement of the Federal Trade Commission Before the United States Senate Special Committee on Aging on Combatting Technical Support Scams ("Tech Support Testimony"), at 3-5 (Oct. 21, 2015), *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/826561/151021techsupporttestimony.pdf](https://www.ftc.gov/system/files/documents/public_statements/826561/151021techsupporttestimony.pdf) (last visited Jan. 31, 2022).

<sup>156</sup> *Id.*

<sup>157</sup> See, e.g., Tech Support Testimony, at 3-5, *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/826561/151021techsupporttestimony.pdf](https://www.ftc.gov/system/files/documents/public_statements/826561/151021techsupporttestimony.pdf) (last visited Jan. 31, 2022).

<sup>158</sup> See, e.g., *FTC v. Click4Support, LLC, et. al.*, No. 15-cv-05777-SD, at 9-10 (E.D. Pa. Oct. 26, 2015), *available at* <https://www.ftc.gov/system/files/documents/cases/151113click4supportcmpt.pdf> (last visited Jan. 31, 2022).

variety of problems with their computers and persuade consumers to purchase subscription tech support services<sup>159</sup> or software they do not need.<sup>160</sup>

The Commission has brought a multitude of cases against sellers and telemarketers perpetrating tech support frauds on consumers.<sup>161</sup> In many of those cases, telemarketers have induced inbound telemarketing by placing advertisements via search engine ads, thus falling outside of the TSR's purview unless the telemarketer also upsells the consumer on a good or service.<sup>162</sup> Given this rising threat and the harm it causes to consumers, particularly those aged 60 and older, the Commission believes the time is ripe to consider repealing the TSR exemption for inbound telemarketing of tech support services.

In considering this proposal, in addition to the questions listed below, the Commission seeks comment on whether: (1) it should add tech support services to the list of goods or services for which the inbound telemarketing exemptions do not apply;<sup>163</sup> (2) it should repeal the exemption only for general media advertisements (e.g., search engine

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<sup>159</sup> See, e.g., *FTC v. Vylah Tec LLC, et. al.*, No. 17-cv-228-FtM-99MRM (M.D. Fa. May 17, 2017), available at [https://www.ftc.gov/system/files/documents/cases/162\\_3253\\_vylah\\_tec\\_llc\\_complant.pdf](https://www.ftc.gov/system/files/documents/cases/162_3253_vylah_tec_llc_complant.pdf) (last visited Jan. 31, 2022).

<sup>160</sup> *Id.*

<sup>161</sup> See, e.g., *FTC v. RevenueWire, Inc.*, No. 1:20-cv-1032 (D.D.C. April 21, 2020) (the companies to which RevenueWire provided payment processing services used pop-up dialog boxes that claimed to have detected computer infections and directed consumers to call a 1-800 number) available at <https://www.ftc.gov/system/files/documents/cases/revcomp3.pdf> (last visited Jan. 31, 2022); *FTC v. Boost Software, Inc.*, No. 14-cv-81397 (S.D. Fla. Nov. 10, 2014) (same as RevenueWire) available at <https://www.ftc.gov/system/files/documents/cases/141119vastboostcmpt.pdf> (last visited Jan. 31, 2022); *FTC v. PCCare247, Inc.*, 12-cv-7189 (S.D.N.Y. Oct. 3, 2012) (PCCare used paid advertisements that made it appear PCCare was affiliated with established computer companies in order to trick consumers to call PCCare's telemarketers) available at <https://www.ftc.gov/sites/default/files/documents/cases/2012/10/121003pccarecmpt.pdf> (last visited Jan. 31, 2022). See also, Press Release, FTC and Federal, State and International Partners Announce Major Crackdown on Tech Support Scams (May 12, 2017) (announcing 16 new cases as part of tech support sweep) available at <https://www.ftc.gov/news-events/press-releases/2017/05/ftc-federal-state-international-partners-announce-major-crackdown> (last visited Jan. 31, 2022) and "Operation Tech Trap Law Enforcement Actions" (May 2017) (listing cases brought as part of tech support sweep) available at [https://www.ftc.gov/system/files/attachments/press-releases/ftc-federal-state-international-partners-announce-major-crackdown-tech-support-scams/operation\\_tech\\_trap\\_chart\\_of\\_actions.pdf](https://www.ftc.gov/system/files/attachments/press-releases/ftc-federal-state-international-partners-announce-major-crackdown-tech-support-scams/operation_tech_trap_chart_of_actions.pdf) (last visited Jan. 31, 2022).

<sup>162</sup> The TSR generally exempts inbound telemarketing calls induced by general media advertisements. 16 CFR 310.6(b)(5) and (6). As noted in Section IV.D, *supra*, the TSR's coverage extends to all upsells, including those in inbound telemarketing. 16 CFR 310.6(b)(5)(iii) & (b)(6)(iii).

<sup>163</sup> See 16 CFR 310.6(b)(5) and (6).

ads) that induce inbound telemarketing of tech support services but retain the exemption for direct mail solicitation under Section 310.6(b)(6); or (3) it should repeal the exemption in its entirety but carve out an exemption for sellers who manufacture the computer at issue, and with whom the consumer has an existing business relationship (i.e., if a consumer purchased a computer from Microsoft, the TSR would not apply to any inbound telemarketing calls induced by or on behalf of Microsoft to that consumer). The Commission also seeks comment on whether tech support service scams impact other devices such as mobile phones or tablets.

### **B. Questions for Inbound Telemarketing of Tech Support Services**

1. Should the TSR apply to inbound telemarketing of tech support services? If not, why not? If yes, why? What harm is caused by such calls? What benefits do such calls confer? What existing Federal or state laws apply to such calls, and are the existing laws sufficient or insufficient to address the identified harm?
2. What kind of tech support services do sellers offer to consumers? What kinds of products do the tech support services cover? What is the nature of the services offered? Do the services require consumers to sign up for a subscription plan? How many services require a subscription plan?
3. How many sellers or telemarketers sell tech support services through inbound telemarketing without using unfair or deceptive acts or practices? How many sellers offer those services only through inbound telemarketing and do not employ any outbound telemarketing? How do consumers learn about these sellers? Do they advertise through general media advertisements or direct mail solicitations? What kind of advertisements? How would requiring such sellers to comply with the TSR affect their business? How would it affect consumers?



4. How many inbound telemarketing calls for tech support services do sellers or telemarketers receive on average per year, per month, or per day? How many of those calls or what percentage of those calls result in a sale?
5. Do sellers or telemarketers that sell tech support services through inbound telemarketing sell those services to consumers, businesses, or both? If sellers or telemarketers are engaged in inbound telemarketing of tech support services to consumers, how many such calls do sellers or telemarketers receive on average per year, per month, or per day? How many of those calls or what percentage of those calls result in a sale? If sellers or telemarketers are engaged in inbound telemarketing of tech support services to businesses, how many such calls do sellers or telemarketers receive on average per year, per month, or per day? How many of those calls or what percentage of those calls result in a sale?
6. How many inbound tech support telemarketing calls were induced by general media advertising such as search engine advertisements? How many of those calls or what percentage of calls induced by general media resulted in a sale?
7. How many inbound tech support telemarketing calls were induced by a direct mail solicitation? How many of those calls or what percentage of calls induced by direct mail solicitations resulted in a sale?
8. Do entities that manufacture and sell computers engage in inbound telemarketing of tech support services to businesses or consumers? If so, do such entities use unfair or deceptive acts or practices to sell their tech support services? If such entities engage in inbound telemarketing of tech support services to consumers, how many calls do such entities receive from consumers on average per year, per month, or per day? How many calls result in a sale? If such entities engage in inbound telemarketing of tech support services to businesses, how many calls do

such entities receive from businesses on average per year, per month, or per day?

How many calls result in a sale?

9. Should the TSR apply to inbound telemarketing of tech support services induced by advertisements through any medium? If yes, why, and what is the harm caused by such solicitations? If not, why not, and should the TSR apply to inbound telemarketing of tech support services induced by particular types of advertisements?
10. Should the TSR apply to inbound telemarketing of tech support services induced by direct mail solicitation? If yes, why and what harm is caused by such solicitations? If not, why not?
11. Should the TSR continue to exempt inbound telemarketing of tech support services but apply the TSR's provisions regarding the use of prerecorded messages, including those that use soundboard technology? If yes, why and what is the harm caused by the use of prerecorded messages in inbound telemarketing of tech support services? If not, why not?
12. If the Commission repeals the exemptions for inbound telemarketing of tech support services, should it create a carve out? What kind of carve out and why? Should the Commission carve out an exemption for entities who manufacture the computer at issue and have an existing business relationship with the consumer? Why or why not?
13. How should the Commission define "tech support services"? Should the definition apply to any type of technology assistance, including for any device (e.g., mobile phones and tablets)? If not, why not? If yes, why and what is the harm caused in connection with those technology assistance services? Have there been instances of fraud occurring in connection with those technology assistance services? How pervasive is this type of fraud?

14. If the Commission considers employing a broad definition of tech support so that it either encompasses multiple types of services, or any form of technology assistance, should the Commission consider carve outs for a particular type of technology assistance? If yes, what carve out should the Commission consider and why?
15. If the Commission repeals the exemptions for inbound telemarketing of tech support services, what burden would be imposed on industry? How do you quantify that burden? How can the Commission repeal the exemption for inbound telemarketing of tech support services but lessen that burden on industry?

## **B. Business-to-Business Telemarketing Calls**

### **1. Regulatory History of Business-to-Business Telemarketing**

#### **Exemption**

The Commission has considered whether to narrow or clarify the business-to-business (“B2B”) exemption on several occasions since its promulgation in 1995.<sup>164</sup> First, in 2003 the Commission considered whether to include a carve out from the exemption for the sale of internet or web services<sup>165</sup> to prevent small businesses from being defrauded as they navigated the then-new world of internet advertising. The Commission defined internet or web services as services that enable businesses to access the internet or the world wide web.<sup>166</sup> The Commission noted that reports of frauds from small

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<sup>164</sup> See Original TSR, 60 FR at 43861.

<sup>165</sup> 2003 TSR Amendments, 68 FR at 4662. The Commission also considered whether to carve out solicitations for charitable contributions from the TSR’s B2B exemption. On balance, the Commission decided to rely on its Section 5 authority to address fraudulent fundraising rather than impose additional regulatory burdens on legitimate non-profit organizations that already operate on very narrow margins. *Id.* at 4663.

<sup>166</sup> The Commission proposed two definitions in its proposed rulemaking – Internet Services and Web Services. 2002 Notice of Proposed Rulemaking, 67 FR at 4500. Internet Services meant any service that allowed a business to access the internet, including internet service providers, providers of software and telephone or cable connections, as well as services that provide access to email, file transfers, websites, and newsgroups. *Id.* Web services was defined as “designing, building, creating, publishing, maintaining, providing, or hosting a website on the internet.” *Id.* The Commission intended for the term internet services to encompass any and all services related to accessing the internet and the term web services to encompass any and all services related to the world wide web. *Id.*

businesses about telemarketers promoting services that could help them increase their internet presence had risen dramatically with the rapid adoption of internet use from 1997 to 2002.<sup>167</sup>

Consumer advocates and law enforcement agencies argued the TSR should not exempt telemarketing of internet or web services to businesses based on extensive law enforcement efforts to combat the proliferation of fraudulent telemarketing of those services.<sup>168</sup> Industry proponents argued the record did not support applying the TSR to those services in such a sweeping fashion and overregulation would result in harming small businesses because “it would increase their costs and hamper their use of Web-based advertising such as online Yellow Pages.”<sup>169</sup> The Commission decided imposing regulations without further evidence that its law enforcement tools were insufficient might negatively impact small businesses by increasing their cost and impeding their use of internet advertising.<sup>170</sup> The Commission stated it needed to “move cautiously so as not to chill innovation in the development of cost-efficient methods for small businesses to join in the Internet marketing revolution.”<sup>171</sup>

The Commission revisited the B2B exemption in 2013 when it issued a Notice of Proposed Rulemaking (“2013 NPRM”) seeking comment on whether to amend the exemption to explicitly limit it to telemarketing calls selling a good or service to that business or seeking a charitable contribution from that business, rather than personal purchases or charitable contributions of employees of the business.<sup>172</sup> The Commission noted in its 2013 NPRM that it had allowed business telephone numbers to be listed on

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<sup>167</sup> *Id.* at 4531; *see also* Press Release, *FTC Cracks Down on Small Business Scams* (June 17, 1999) (announcing sweep of cases against fraudulent telemarketers who scammed small businesses by offering a negative option website design and hosting service to help small businesses create an internet presence), *available at* <https://www.ftc.gov/news-events/press-releases/1999/06/ftc-cracks-down-small-business-scams> (last visited Jan. 31, 2022).

<sup>168</sup> 2003 TSR Amendments, 68 FR at 4662.

<sup>169</sup> *Id.* at 4663.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Notice of Proposed Rule Making (“2013 TSR NPRM”), 78 FR 41200, 41219 (July 9, 2013).

the FTC’s Do Not Call (“DNC”) Registry “because, among other reasons, telemarketers who seek to circumvent the Registry have solicited employees at their place of business to buy goods or services such as dietary products, auto warranties, and credit assistance.”<sup>173</sup> In implementing the amendment in 2015, the Commission reiterated the amendment is “simply a clarification of the scope of the existing exemption, not a change in its substance” and the “clarification should further deter telemarketers from attempting to circumvent the Registry.”<sup>174</sup>

## **2. Law Enforcement Experience in Deceptive Business-to-Business Telemarketing**

Since the Commission last considered, and declined, to substantively amend the B2B exemption to exclude services providing access to the internet, the marketplace has substantially evolved. The digital marketing landscape has become increasingly complex and rife with opportunities for sellers or telemarketers to defraud small businesses by selling them services to help them advertise their businesses online. Indeed, the expansion of the different ways to advertise online has been accompanied by numerous types of deceptive telemarketing schemes aimed at small businesses, including schemes that have purportedly sold business directory listing services, the very same services industry proponents claimed small businesses would not be able to access if the Commission implemented its proposed amendments.<sup>175</sup> The Commission has brought many cases against fraudulent telemarketers selling services that purportedly assist small businesses to advertise online, including business directory listings,<sup>176</sup> web hosting or

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<sup>173</sup> *Id.* at 41219.

<sup>174</sup> *Id.*

<sup>175</sup> *See supra* note 169.

<sup>176</sup> *See, e.g., FTC v. Your Yellow Book Inc.*, No. 14-cv-786-D (W.D. Ok. July 24, 2014), *available at* <https://www.ftc.gov/system/files/documents/cases/140807youryellowbookcmpt.pdf> (last visited Jan. 31, 2022); *FTC v. OnlineYellowPagesToday.com, Inc.*, No. 14-cv-0838 RAJ (W.D. Wa. June 9, 2014), *available at* <https://www.ftc.gov/system/files/documents/cases/140717onlineyellowpagescmpt.pdf> (last visited Jan. 31, 2022); *FTC v. Modern Tech. Inc., et. al.*, No. 13-cv-8257 (Nov. 18, 2013) *available at* <https://www.ftc.gov/sites/default/files/documents/cases/131119yellowpagescmpt.pdf> (last visited Jan. 31,

design scams,<sup>177</sup> and search engine optimization (“SEO”) services.<sup>178</sup> The Commission has also seen deceptive telemarketing schemes that target businesses in other areas not related to online advertising services.<sup>179</sup> In fact, the Commission has filed cases against other telemarketing frauds targeting small businesses such as market-specific advertising opportunities<sup>180</sup> and government imposter scams.<sup>181</sup> Given the Commission’s law enforcement experience in this area showing the prevalence of fraud in digital marketing services targeting businesses, and the maturation of this industry, the Commission believes it is time to reconsider whether the TSR should continue to exempt B2B

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2022); *FTC v. 6555381 Canada Inc. d/b/a Reed Publishing*, No. 09-cv-3158 (N.D. Ill. May 27, 2009) available at <https://www.ftc.gov/sites/default/files/documents/cases/2009/06/090602reedcmpt.pdf> (last visited Jan. 31, 2022); *FTC v. 6654916 Canada Inc. d/b/a Nat’l. Yellow Pages Online, Inc.*, No. 09-cv-3159 (N.D. Ill. May 27, 2009), available at <https://www.ftc.gov/sites/default/files/documents/cases/2009/06/090602nypocmpt.pdf> (last visited Jan. 31, 2022); *FTC v. Integration Media, Inc.*, No. 09-cv-3160 (N.D. Ill. May 27, 2009), available at <https://www.ftc.gov/sites/default/files/documents/cases/2009/06/090602goamcmpt.pdf> (last visited Jan. 31, 2022); *FTC v. Datacom Mktg. Inc., et. al.*, No. 06-cv-2574 (N.D. Ill. May 9, 2006), available at <https://www.ftc.gov/sites/default/files/documents/cases/2006/05/060509datacomcomplaint.pdf> (last visited Jan. 31, 2022); *FTC v. Datatech Commc’ns, Inc.*, No. 03-cv-6249 (N.D. Ill. Aug. 3, 2005) (filing amended complaint), available at <https://www.ftc.gov/sites/default/files/documents/cases/2005/08/050825compdatatech.pdf> (last visited Jan. 31, 2022); *FTC v. Ambus Registry, Inc.*, No. 03-cv-1294 RBL (W.D. Wa. June 16, 2003), available at <https://www.ftc.gov/sites/default/files/documents/cases/2003/07/ambuscomp.pdf> (last visited Jan. 31, 2022).

<sup>177</sup> See *FTC v. Epixtar Corp., et. al.*, No. 03-cv-8511(DAB) (S.D.N.Y. Nov. 3, 2003), available at <https://www.ftc.gov/sites/default/files/documents/cases/2003/11/031103comp0323124.pdf> (last visited Jan. 31, 2022); *FTC v. Mercury Marketing of Delaware, Inc.*, No. 00-cv-3281 (E.D. Pa. Aug. 12, 2003) (filing for an Order to Show Cause Why Defendants Should Not be Held in Contempt), available at <https://www.ftc.gov/sites/default/files/documents/cases/2003/08/030812contempmercurymarketing.pdf> (last visited Jan. 31, 2022).

<sup>178</sup> See, e.g., *FTC v. Pointbreak Media, LLC*, No. 18-cv-61017-CMA (S.D. Fla. May 7, 2018), available at [https://www.ftc.gov/system/files/documents/cases/matter\\_1723182\\_pointbreak\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/matter_1723182_pointbreak_complaint.pdf) (last visited Jan. 31, 2022); *FTC v. 7051620 Canada, Inc.* No. 14-cv-22132 (S.D. Fla. June 9, 2014), available at <https://www.ftc.gov/system/files/documents/cases/140717nationalbusadcmpt.pdf> (last visited Jan. 31, 2022).

<sup>179</sup> A 2018 survey conducted by the Better Business Bureau revealed that the same scams that harm consumers, such as tech support scams and imposter scams, also harm small businesses, and that 57% of scams that impact small businesses are perpetrated through telemarketing. Better Business Bureau, *Scams and Your Small Business Research Report*, at 9-10 (June 2018), available at [https://www.bbb.org/globalassets/local-bbbs/council-113/media/small-business-research/bbb\\_smallbizscamsreport-final-06-18.pdf](https://www.bbb.org/globalassets/local-bbbs/council-113/media/small-business-research/bbb_smallbizscamsreport-final-06-18.pdf) (last visited Jan. 31, 2022).

<sup>180</sup> See, e.g., *FTC v. Production Media Co.*, No. 20-cv-00143-BR (D. Or. Jan. 23, 2020), available at [https://www.ftc.gov/system/files/documents/cases/production\\_media\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/production_media_complaint.pdf) (last visited Jan. 31, 2022).

<sup>181</sup> See, e.g., *FTC v. DOTAuthority.com*, No. 16-cv-62186 (S.D. Fla. Sept. 13, 2016) available at <https://www.ftc.gov/system/files/documents/cases/162017dotauthoriity-cmpt.pdf> (last visited Jan. 31, 2022); *FTC v. D & S Mktg. Solutions LLC*, No. 16-cv-01435-MSS-AAS (M.D. Fla. June 6, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160621dsmarketingcmpt.pdf> (last visited Jan. 31, 2022).

telemarketing at all, or at a minimum, B2B telemarketing of digital marketing services or imposter scams that harm businesses.<sup>182</sup> The Commission also believes there is sufficient evidence to apply the TSR’s prohibitions against making material misrepresentations or false or misleading statements in B2B telemarketing and seeks comment on this proposal in the NPRM.

### 3. Market Changes in People’s Work Experience

In addition to the Commission’s law enforcement experience, the Commission also notes that since it last considered making substantive changes to the exemption in 2003, technological advancements, along with current events, have drastically affected where people typically perform their jobs as well as the types of jobs they perform. Specifically, technological changes have provided people more workplace flexibilities,<sup>183</sup> resulting in greater numbers of people working from home on either a part-time or full-time basis.<sup>184</sup> But more significantly, the COVID-19 pandemic has resulted in an

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<sup>182</sup> See *supra* note 186; see also, FTC Blog, *Protecting Small Business from Imposters* (Jan. 9 2020), available at <https://www.consumer.ftc.gov/blog/2020/01/protecting-small-business-imposters> (last visited Jan. 31, 2022).

<sup>183</sup> See Rachel M. Krantz-Kent, Monthly Labor Review: Where did Workers Perform Their Jobs in the Early 21<sup>st</sup> Century?, U.S. Bureau of Labor and Statistics (July 2019), available at <https://www.bls.gov/opub/mlr/2019/article/where-did-workers-perform-their-jobs.htm> (last visited Jan. 31, 2022) (noting that “advances in information and communication technology allow people to reach their colleagues and clients by phone, email, or text from nearly anywhere, at all hours of the day” and that the “development and expansion of secure computer networks, cloud computing, and wireless connections provide additional flexibility in where and when work can be done”).

<sup>184</sup> A 2017 survey estimated that approximately 43% of Americans spend some time working from home, with increasing numbers working remotely four to five days a week. Niraj Chokshi, *Out of the Office: More People Are Working Remotely, Survey Finds*, N.Y. Times, Feb. 15, 2017, available at <https://www.nytimes.com/2017/02/15/us/remote-workers-work-from-home.html> (last visited Jan. 31, 2022). See also U.S. Bureau of Labor Statistics (“BLS”), *Ability to Work From Home: Evidence From Two Surveys and Implications for the Labor Market in the COVID-19 Pandemic*, at n.1 (June 2020), available at [https://www.bls.gov/opub/mlr/2020/article/ability-to-work-from-home.htm#\\_edn1](https://www.bls.gov/opub/mlr/2020/article/ability-to-work-from-home.htm#_edn1) (last visited Jan. 31, 2022) (citing to a survey conducted by Global Workforce Analytics that reported the number of workers who worked at home at least half the time increased by 115% from 2005 to 2017); see also BLS, *Job Flexibilities and Work Schedules – 2017-2018: Data from the American Time Use Survey* (Sept. 19, 2019), available at <https://www.bls.gov/news.release/flex2.nr0.htm> (last visited Jan. 31, 2022) (reporting that approximately 25% of wage and salary workers worked at home occasionally); BLS, *Work at Home Summary in 2004* (Sept. 25, 2005), available at <https://www.bls.gov/news.release/homey.nr0.htm> (last visited Jan. 31, 2022) (reporting that approximately 15% of workers reported working from home at least once per week).

unprecedented number of people working from home since March 2020.<sup>185</sup> Although it is difficult to predict whether people will continue to work from home in such large numbers in the future, industry analysts currently believe businesses will provide greater work flexibilities to their employees post-pandemic.<sup>186</sup> The Commission's DNC Registry is meant, in part, to protect consumers' privacy from an abusive pattern of calls.<sup>187</sup> With more people working from home, the likelihood B2B telemarketing will impinge on the privacy of a consumer's home is escalating. This raises the question whether the DNC Registry will still be able to effectively protect consumers' privacy if the TSR is not extended to cover B2B telemarketing.

Additionally, the rise of the gig economy and the economic impact of the pandemic has resulted in more people utilizing alternative work arrangements to supplement their income, or as a means of full-time employment.<sup>188</sup> The gig economy

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<sup>185</sup> The Federal Reserve, *Update on the Economic Well-Being of U.S. Households: July 2020 Results*, at 4 (Sept. 22, 2020), available at <https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-update-202009.pdf> (last visited Jan. 31, 2022) (reporting that approximately 41% and 31% of workers were working from home when the surveys were conducted in April 2020 and July 2020, respectively.).

<sup>186</sup> See Press Release, Gartner, Inc., Gartner HR Survey Reveals 41% of Employees Likely to Work Remotely at Least Some of the Time Post Coronavirus Pandemic (April 14, 2020), available at <https://www.gartner.com/en/newsroom/press-releases/2020-04-14-gartner-hr-survey-reveals-41--of-employees-likely-to-> (last visited Jan. 31, 2022); See also, McKinsey & Company, *The Future of Telework after Covid-19* (Feb. 18, 2021), available at <https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19> (last visited Jan. 31, 2022) (reporting that approximately 4-5 times more telework is possible post Covid-19 in advanced economies and in jobs in which remote work can be done without loss of productivity and that a survey of executives revealed they planned to reduce their office footprint by approximately 30%); PwC, *US Remote Work Survey* (Jan. 12, 2021), available at <https://www.pwc.com/us/en/library/covid-19/us-remote-work-survey.html#content-free-1-24f5> (last visited Jan. 31, 2022) (reporting a hybrid workplace where employees rotate in and out of the offices configured for shared spaces is a likely outcome post Covid-19).

<sup>187</sup> 2003 TSR Amendments, 68 FR at 4631.

<sup>188</sup> Shane McFeely and Ryan Pendell, *The Gig Economy and Alternative Work Arrangements*, at 6 (Aug. 18, 2018), available at <https://www.gallup.com/workplace/240929/workplace-leaders-learn-real-gig-economy.aspx> (last visited Jan. 31, 2022) (reporting approximately 36% of workers are involved in the gig economy); see also The Federal Reserve, *Report on the Economic Well-Being of U.S. Households in 2019, Featuring Supplemental Data from April 2020*, at 18 (May 2020), available at <https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf> (last visited Jan. 31, 2022) (reporting approximately one in three of all adults engaged in gig work). Another survey estimated that approximately 30% of the population freelanced or participated in the gig economy in the U.S., and projected that approximately 50% of the population will be freelancing in 10 years. Elaine Pofeldt, *Are We Ready For A Workforce That Is 50% Freelance?*, *Forbes*, Oct. 17, 2017, available at <https://www.forbes.com/sites/elainepofeldt/2017/10/17/are-we-ready-for-a-workforce-that-is-50-freelance/#6c123af23f82> (last visited Jan. 31, 2022). See also, Matthew Laviertes and Michael McCoy, *Waiting for Work: Pandemic Leaves U.S. Gig Workers Clamoring for Jobs*, *Reuters*, Oct. 19, 2020,



refers to alternative work arrangements including independent contractors, online platform workers, contract firm work, on-call workers, and temporary workers.<sup>189</sup> Given the nature of gig work, it is likely gig workers utilize their personal phones for business purposes rather than relying on separate phone lines dedicated for business purposes. Thus, for gig workers, allowing B2B telemarketing might subject them to an increasing number of unwanted calls they cannot avoid by using call-blocking technology<sup>190</sup> or by placing their numbers on the FTC's DNC Registry.<sup>191</sup> This is not a new dilemma; one commenter to the Regulatory Review highlighted it as a challenge for home-based businesses several years ago.<sup>192</sup> But it may be on the rise along with the gig economy. This issue likely affects more than just home-based businesses and applies to any person who utilizes one phone for both personal purposes and business purposes. Despite the Commission's amendments in 2015 to make explicit that the B2B telemarketing exemption only applies to the sale of goods or services to a business, unscrupulous telemarketers could take advantage of this rising trend to assert the B2B exemption should apply if a person does have a dual purpose phone.

In light of these changes in workforce dynamics, the Commission is seeking comment on whether the TSR should continue to exempt B2B telemarketing calls.

Specifically, the Commission seeks comments on whether: (1) the exemption should be

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available at <https://www.reuters.com/article/us-biggerpicture-health-coronavirus-gigw/waiting-for-work-pandemic-leaves-u-s-gig-workers-clamoring-for-jobs-idUSKBN2741DM> (last visited Jan. 31, 2022) (reporting that with unemployment soaring, more workers are joining the gig economy).

<sup>189</sup> See Shane McFeely and Ryan Pendell, *The Gig Economy and Alternative Work Arrangements*, at 6 (Aug. 18, 2018), available at <https://www.gallup.com/workplace/240929/workplace-leaders-learn-real-gig-economy.aspx> (last visited Jan. 31, 2022) (examples of gig workers include Uber drivers, Task Rabbit workers, contract nurses, and free lancers).

<sup>190</sup> While call-blocking technology may be effective for a consumer's personal phone, businesses and individuals using their personal phones for business purposes may not feel able to employ call-blocking technology to the same extent if they anticipate receiving calls from prospective customers.

<sup>191</sup> Because the TSR exempts B2B telemarketing calls, a seller or telemarketer engaged in B2B telemarketing may argue that it is not prohibited from calling people on the FTC's Do Not Call registry if those people are also using their phone numbers for business purposes and the seller or telemarketer is calling to sell a good or service to a business.

<sup>192</sup> West Italian, No. 00113, at 3.

repealed in its entirety;<sup>193</sup> (2) the exemption should be partially repealed so that only specific provisions of the TSR would apply to B2B telemarketing; or (3) the exemption should be partially repealed so that the TSR applies to a subset of B2B telemarketing based on, for example, the particular goods or services offered for sale.

Because, as PACE has noted, telemarketers cannot easily differentiate between residential phone numbers and business phone numbers,<sup>194</sup> the Commission believes it is possible many telemarketers who engage in telemarketing to businesses may already ensure that they do not make calls to numbers on the FTC's DNC Registry even though they are not currently required to comply with the DNC provisions of the TSR. As such, the Commission is also particularly interested in seeking comment on the number of sellers or telemarketers who engage in telemarketing to businesses. The Commission is also interested in whether, in the ordinary course of business, such sellers or telemarketers make any attempts to determine whether a phone number is on the FTC's DNC Registry or to differentiate between phone numbers used for personal purposes and those used for business purposes.

From its law enforcement experience and through its policy work in connection with the Every Community Initiative, the Commission is cognizant that fraud and other consumer and business concerns can have disproportionate negative impacts on underserved communities.<sup>195</sup> Thus, the Commission is also interested in understanding whether its proposal to apply more completely the TSR to B2B telemarketing will impact underserved communities differently. For example, would applying the TSR to B2B

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<sup>193</sup> The Commission is publishing an NPRM in conjunction with this ANPR. The NPRM proposes, among other things, prohibiting deception in business-to-business telemarketing calls. This ANPR seeks additional comment on the B2B exemption including whether it should be repealed in its entirety.

<sup>194</sup> PACE, No. 00107, at 6.

<sup>195</sup> See *Serving Communities of Color: A Staff Report on the Federal Trade Commission's Efforts to Address Fraud and Consumer Issues Affecting Communities of Color*, *available at* [https://www.ftc.gov/system/files/documents/reports/serving-communities-color-staff-report-federal-trade-commissions-efforts-address-fraud-consumer/ftc-communities-color-report\\_oct\\_2021-508-v2.pdf](https://www.ftc.gov/system/files/documents/reports/serving-communities-color-staff-report-federal-trade-commissions-efforts-address-fraud-consumer/ftc-communities-color-report_oct_2021-508-v2.pdf) (last visited Jan. 31, 2022).

telemarketing impose greater burdens on minority-owned businesses engaged in telemarketing? Would it create barriers to entrepreneurship when entrepreneurs from communities of color are already underrepresented compared to their share of the population?<sup>196</sup> Or would it provide greater protection to minority-owned businesses against fraud and disruptive telemarketing? The Commission has found very few sources of data on these issues and invites comments that can help the Commission understand the full impact of its proposal on underserved communities.

### **C. Questions for Business-to-Business Telemarketing Calls**

*Questions regarding possible benefits to people and businesses from repealing the*

#### *B2B exemption:*

1. How many telemarketing calls do businesses and non-profit charitable organizations receive on average per year, per month, or per day? What kinds of goods or services are the subject of those B2B telemarketing calls? Do businesses and non-profit charitable organizations receive B2B telemarketing calls utilizing prerecorded messages, including soundboard technology? If yes, how many do businesses receive on average per year, per month, or per day? What kinds of goods or services are sold to businesses and non-profit charitable organizations via prerecorded message? How many of these calls involve soundboard technology?
2. Do businesses and non-profit charitable organizations receive telemarketing calls soliciting charitable contributions? If yes, how many such calls do businesses receive on average per year, per month, or per day? On behalf of what kinds of organizations do telemarketers solicit charitable contributions from businesses and non-profit charitable organizations? Do businesses and non-profit charitable organizations receive B2B

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<sup>196</sup> See, Michael McManus, Minority Business Ownership: Data from the 2012 Survey of Business Owners, Office of Advocacy, U.S. Small Business Administration, at 1-2 (Sept. 14, 2016), *available at* <https://cdn.advocacy.sba.gov/wp-content/uploads/2016/09/07141514/Minority-Owned-Businesses-in-the-US.pdf> (last accessed June 29, 2021).

telemarketing that use prerecorded messages to solicit charitable contributions? How many such calls do businesses and non-profit charitable organizations receive on average per year, per month, or per day? Do those messages utilize soundboard technology?

3. Do people or businesses support repealing the business-to-business exemption from the TSR? If not, why not? If yes, what harm does B2B telemarketing cause to people, to small businesses, or to businesses of any size? What is an accurate estimate of annual harm suffered by businesses as a result of B2B telemarketing?

4. Do underserved communities support repealing the business-to-business exemption from the TSR? If not, why not? If yes, what harm does B2B telemarketing cause to underserved communities? What is an accurate estimate of annual harm suffered by underserved communities as a result of B2B telemarketing?

5. Do B2B telemarketing calls cause harm to non-profit charitable organizations? If yes, what harm does B2B telemarketing calls cause? If not, why not?

6. Should the TSR apply to all B2B telemarketing calls? If so, why? If not, why not? If not, what types of B2B telemarketing calls should the TSR apply to and why? What harm do those B2B telemarketing calls cause to people, businesses, or non-profit charitable organizations?

7. Should the TSR apply only to B2B telemarketing calls offering digital marketing goods or services to businesses or non-profit charitable organizations and imposter scams? If not, why not? If yes, why? How would you define digital marketing goods or services? What harm is caused by telemarketing these goods or services to businesses or non-profit charitable organizations? If the TSR were applied to B2B telemarketing calls of digital marketing goods or services or imposter scams harming businesses, should the TSR carve out any exceptions? If yes, what exceptions and why?

8. Should the TSR be limited to B2B telemarketing calls of specific goods or services? If yes, what goods or services? What harm is caused by telemarketing those goods or

services to businesses or non-profit charitable organizations? What existing Federal or state laws apply to the telemarketing of those goods or services to businesses or non-profit charitable organizations? Why are the existing laws governing the sale of those goods or services to businesses or non-profit charitable organizations insufficient to prevent the identified harm? Should all provisions of the TSR apply to the telemarketing of those goods or services to businesses? If not, why not and what specific TSR provisions should apply? Should there be any carve outs from applying the TSR or specific provisions of the TSR to the telemarketing of those goods or services to businesses or non-profit charitable organizations?

9. Should the TSR eliminate the exemption for inbound B2B telemarketing calls? If not, why not? If so, why? What harm is caused by inbound B2B telemarketing?

10. Should the TSR eliminate the exemption for outbound B2B telemarketing calls? If not, why not? If so, why? What harm is caused by outbound telemarketing that affects businesses or non-profit charitable organizations?

11. Should all of the provisions of the TSR apply to B2B telemarketing calls? If yes, why? If not, which provision(s) of the TSR should apply to B2B telemarketing calls? What harm would be prevented by applying that provision?

12. Should the TSR's provisions regarding the use of prerecorded messages apply to B2B telemarketing calls? If no, why not? If yes, why? What harm is caused by B2B telemarketing calls that utilize prerecorded messages?

13. How many people work from home? How many days per week do people work from home? Do people who work from home use a separate phone number for business purposes? Do people who work from home use their personal mobile or home landline for business purposes? Do people who work from home receive B2B telemarketing calls? Do they receive those calls on their personal phone numbers or business phone numbers? How many B2B telemarketing calls do they receive? Do any of those B2B telemarketing

calls use prerecorded messages? How many B2B telemarketing calls using prerecorded messages do they receive? What types of goods or services are offered for sale in B2B telemarketing calls that use prerecorded messages?

14. How many people are employed in the gig economy? How many gig workers use a separate business phone number for their gig work? How many gig workers use one phone number for personal purposes and another for their gig work? Do gig workers receive B2B telemarketing calls? How many B2B telemarketing calls do they receive? Do any of those B2B telemarketing calls use prerecorded messages? How many B2B telemarketing calls that use prerecorded messages do they receive? What types of goods or services are offered for sale in the B2B telemarketing calls that gig workers receive?

15. Do businesses or non-profit organizations employ call-blocking technologies? If yes, do they successfully reduce the number of unwanted B2B telemarketing calls? If they don't use such technologies, why not?

16. Do people who work from home or gig workers use call-blocking technologies? If yes, do they use such technologies on their business phones or personal phones? Do the call-blocking technologies successfully reduce the number of unwanted telemarketing calls, including unwanted B2B calls, if any? If they don't use such technologies, why not?

17. How many home-based businesses have a dedicated phone number for business purposes? How many B2B telemarketing calls do such businesses receive on their business phone numbers on average per year, per month, or per day? How many home-based businesses utilize one phone number for both personal and business purposes? How many B2B telemarketing calls do such businesses receive on their dual purpose phone number on average per year, per month, or per day? Do home-based businesses use call-blocking technologies? If yes, do such businesses use call-blocking technologies on their business lines? Do call-blocking technologies successfully reduce the number of

unwanted telemarketing calls, including unwanted B2B calls, if any? If not, why don't home-based businesses use call-blocking technologies? What types of goods or services are offered for sale in the B2B telemarketing calls that home-based businesses receive?

18. How many small businesses have a dedicated phone number for business purposes? How many B2B telemarketing calls do such businesses receive on their business lines on average per year, per month, or per day? How many small businesses have one phone number that they use for personal and business purposes? How many B2B telemarketing calls do such businesses receive on their dual purpose phone number on average per year, per month, or per day? Do small businesses use call-blocking technologies? If yes, do small businesses use call-blocking technologies on their business lines? Do call-blocking technologies successfully reduce the number of telemarketing calls, including unwanted B2B calls, if any? If not, why don't small businesses use call-blocking technologies? What types of goods or services are offered for sale in the B2B telemarketing calls that small businesses receive?

19. How do sellers or telemarketers determine whether a phone number belongs to a person or a business? Has this determination been made more difficult by people working from home or participating in the gig economy?

*Questions regarding the potential burden to telemarketers and sellers from repealing the B2B exemption:*

1. How many sellers or telemarketers engage in telemarketing to businesses? How much revenue do sellers or telemarketers make in telemarketing to businesses and how would removing the exemption for B2B sales affect their revenue?
2. How many sellers or telemarketers engage in telemarketing exclusively to businesses and do not engage in telemarketing to people?
3. How many telemarketers solicit charitable contributions from businesses? Do those same telemarketers also solicit charitable contributions from people?

4. What goods or services do sellers offer for sale to businesses through telemarketing?

Do sellers utilize other means of marketing those same goods or services to businesses?

Do sellers sell those same goods or services to people?

5. How many outbound B2B telemarketing calls do sellers or telemarketers make on average per year, per month, or per day? How many of those calls or what percentage of those outbound B2B telemarketing calls result in a sale? How many inbound B2B telemarketing calls do sellers or telemarketers receive on average per year, per month, or per day? How many of those calls or what percentage of those inbound telemarketing calls result in a sale? Do sellers or telemarketers keep records of the outbound calls or inbound B2B telemarketing calls in the ordinary course of business? What type of records do sellers or telemarketers keep of those telemarketing calls? How long are they kept?

6. Do sellers or telemarketers offer goods or services to businesses by using prerecorded messages, including through soundboard technology? If so, how many B2B telemarketing calls do sellers or telemarketers make using prerecorded messages on average per year, per month, or per day? How many of those calls result in a sale?

7. Do sellers or telemarketers make B2B telemarketing calls involving debt relief services? If so, how many calls involving debt relief services do sellers or telemarketers make on average per year, per month, or per day? How many of those calls or what percentage of those calls result in a sale?

8. What is the estimated burden of complying with the TSR if the B2B exemption is repealed for both outbound and inbound telemarketing? What is the basis for the estimated burden?

9. What is the estimated burden of complying with the TSR if the B2B exemption for outbound telemarketing is repealed? What is the basis for the estimated burden?



10. What is the estimated burden to underserved communities of complying with the TSR if the B2B exemption is repealed for outbound telemarketing? What is the estimated burden to underserved communities of complying with the TSR if the B2B exemption is repealed for inbound telemarketing? What is the basis for the estimated burden?
11. What is the estimated burden of complying with the TSR if the B2B exemption is repealed for the sale of digital marketing goods or services or imposter scams that harm businesses? What is the basis for the estimated burden?
12. What is the estimated burden of complying with the TSR if the B2B telemarketing calls are required to comply with the TSR's provisions regarding prerecorded messages? What is the basis for the estimated burden?
13. Do sellers or telemarketers who engage in B2B telemarketing take any steps to ensure they are not making calls to phone numbers on the DNC Registry? If so, what steps do sellers or telemarketers take? Do such sellers or telemarketers also engage in telemarketing to people? Do sellers or telemarketers who engage in B2B telemarketing exclusively take steps to ensure that they are not making calls to phone numbers on the FTC's DNC Registry? If so, what steps do such sellers or telemarketers take? Do they access the DNC Registry?

#### **D. Questions for Negative Option Notice and Cancellation Mechanisms**

As discussed in Section IV.C, the Commission seeks comment on the proposal that negative option sellers and telemarketers provide consumers with notice and the opportunity to cancel before they are billed for negative option products. The Commission also seeks comment on the scope of deceptive or abusive inbound telemarketing with a negative option feature.

1. How many telemarketing calls involve a negative option feature on average per year, per month, or per day? How many of those calls or what percentage of those calls result in a sale?

2. Which industries offer negative option goods or services through telemarketing and what products do they sell? How many of the goods or services sold by these industries are sold through telemarketing that includes negative options?
3. When sellers or telemarketers sell goods, or services with negative option features, how often (e.g., weekly, monthly, annually) do the sellers bill consumers and businesses?
4. Do sellers or telemarketers already provide consumers notice when consumers and businesses are billed as part of negative option programs? How is that notice provided? How often is the notice provided before the consumer and business is billed? What is the cost of providing this notice?
5. Do consumers want notification that they are about to be charged for a subscription plan? If so, how would they like to be notified? How often would they like to be notified? When would they like the notification to take place (e.g., one week before being charged)?
6. What cancelation mechanisms do sellers or telemarketers provide for consumers and businesses to cancel their negative option programs? What is the cost of these mechanisms? Are some mechanisms easier for consumers to use than others? If sellers or telemarketers offer multiple cancelation mechanisms, how often do consumers use each mechanism?
7. Do consumers and businesses who purchase a negative option product or service through telemarketing have a preference for how they communicate with the seller (e.g. email, phone, online chat, or some other method)?
8. Do consumers and businesses who purchase negative option products or services through telemarketing typically have email accounts where they can receive notice of negative option programs? Do they typically provide email addresses to sellers or telemarketers? Do they have a preference for how they cancel the negative option or

service? If not, what is the best way for those consumers and businesses to cancel negative-option programs?

9. When sellers or telemarketers sell negative option programs to consumers and businesses, what personal information do they obtain? How often do sellers or telemarketers communicate with consumers by email?

10. How often do sellers or telemarketers use unfair or deceptive acts or practices to sell goods or services with a negative option feature solely through inbound telemarketing that are not part of an upsell? Are goods or services other than tech support sold in this manner? If so, which goods or services and how often are they sold in this manner? Should the TSR be further amended to provide consumers with additional protections against these deceptive acts or practices? How so?

## **VI. Comment Submissions**

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Write “Telemarketing Sales Rule ANPR, R411001” on your comment. Your comment – including your name and your state – will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Because of the public health emergency in response to the COVID-19 outbreak and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comment online through the <https://www.regulations.gov> website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write “Telemarketing Sales Rule ANPR, R411001” on your comment and on the envelope and mail your comment to the

following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex B), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website, <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential" – as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2) – including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at [www.regulations.gov](https://www.regulations.gov) – as legally required by FTC Rule 4.9(b) – we cannot redact or remove your comment from the FTC Website, unless

you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Website to read this document and the news release describing it. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

By direction of the Commission.

**April J. Tabor,**

*Secretary.*

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